LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 184

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA, ET AL., APPELLANTS,

vs.

EE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS

No. 185

EE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS, APPELLANTS,

vs.

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA; ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED JULY 1, 1954

PROBABLE JURISDICTION NOTED OCTOBER 18, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 184

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA, ET AL., APPELLANTS,

vs.

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS

No. 185

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS, APPELLANTS,

vs.

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA; ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

INDEX

	Original	Print
Record from U.S.D.C. for the Western District of Oklahoma	a	1
Caption (omitted in printing)	a	
Complaint	1	1
Exhibit A—Excerpt from lease agreement between Zale Jewelry Company, Inc. and Dr. Oran Rips	16	14
Exhibit B—Excerpt from Enrolled House Bill 953	17	15
Exhibit C—Letter dated September 1, 1953 from Zale Jewelry Company to Dr. Oran Rips	18	17

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 23, 1954

Record from U.S.D.C. for the Western District of Oklahoma—Continued	Original	Print
Temporary restraining order	20	18
Amended answer and counterclaim of the defendants	23	19
Plaintiffs' reply to defendants' counterclaim	30	23
Defendants' proposed judgment and decree	33	24
Judgment and decree	37	27
Defendants' petition for appeal	41	29
Order allowing appeal	43	30
Bond (omitted in printing)	45	
Citation (omitted in printing)	47	
Defendants' Assignment of errors and prayer for reversal	50	31
Statement required by paragraph 2, Rule 12 of the rules of Supreme Court (omitted in printing)	54	
Certificate of service and notice of appeal (omitted in printing)	112	
Plaintiffs' petition for appeal	115	33
Plaintiffs' Assignment of errors and prayer for reversal	117	34
Exhibit A—Letter dated March 13, 1954 from W. S. Farmer, O.D. to Fellow Optometrists (copy) (omitted in printing)	119	
Opinion, Wallace, J.	129	36
Partial dissenting opinion, Murrah, J.	155	62
Statement required by paragraph 2, Rule 12 of the rules of the Supreme Court (omitted in printing)	169	
Exhibit B—Enrolled House Bill No. 953 (copy) (omitted in printing)	171	
Praecipe (omitted in printing)	176	
Order allowing appeal	179	69
Bond (omitted in printing)	182	
Citation (omitted in printing)	185	
Certificate of service and notice of appeal (omitted in printing)	188	
Motion and order of plaintiffs to have original records transmitted to the Supreme Court (omitted in printing)	191	
Transcript of proceedings	196	70
Appearances	196	70
Opening statement by Mr. Woods on behalf of plaintiffs	200	71
Opening statement by Mr. Daugherty on behalf of defendants	208	76
Testimony of Dr. Tullos O. Coston	229	89
Allen D. Hill	269	114
Carl C. Barber	335	156
Colloquy between court and counsel	362	174

Record from U.S.D.C. for the Western District of Oklahoma—Continued	Original	Print
Statement by Mr. Woods	366	176
Colloquy between court and counsel	369	178
Testimony of Allen D. Hill (recalled)	390	196
Dr. Oran Rips	404	199
Dr. Ellis Carp	412	204
Colloquy between court and counsel	438	220
Testimony of Dr. Richard A. Clay	449	227
Dr. F. T. Staekpole	477	245
Colloquy between court and counsel	505	262
Reporters' certificate (omitted in printing)	511	
Deposition of Dr. Arthur M. Culler	514	266
Dr. Frederick C. Cordes	533	274
Exhibit 1—Letter dated May 11, 1953 from Oklahoma State Medical Association to Rep. Paul Harkey	596	308
Deposition of Dr. William L. Benedict	600	308
Dr. Alson Emmons Braley	658	337
Dr. Albert N. Lemoine, Jr.	713	366
Dr. Charles Sheard	776	402
Plaintiffs' Exhibits	885	459
No. 2—Letter dated March 13, 1953 from W. S. Farmer, O.D. to Fellow Optometrists	885	459
No. 14—Document, "Selected Examination Questions and Written Tests," given by the American Board of Opticianry, etc.	887	462
No. 15—Document, "Outlines and Syllabuses," American Board of Opticianry	893	468
No. 18—Prescription of C. W. McClure M.D. for Mrs. Warren Towe, dated January 10, 1952	899	477
No. 19—American Optical Company Prescription Service for L. J. Martin, Wichita, Kansas	900	478
Plaintiffs' Exhibits	900b	479
No. 20—Prescription of Dr. W. G. Gillett, et al. for Lloyd J. Martin dated September 12, 1951	900b	479
No. 21—Prescription for Duke Duvall of Tullos O. Coston, M. D. dated August 18, 1951	901	480
No. 22—Lease agreement between Zale Jewelry Company, Inc. and Dr. Oran Rips, June 17, 1953 (copy) (omitted in printing)	902	
No. 23—Letter dated September 1, 1953, from Zale Jewelry Company to Dr. Oran Rips (copy) (omitted in printing)	904	
No. 24—Request for admission of plaintiffs (omitted in printing)	905	
Praecipe of defendants (omitted in printing)	946	

	Original	Print
Record from U.S.D.C. for the Western District of Oklahoma—Continued		
Appellees' designation of additional matters to be included in the record (omitted in printing)	951	
Amendment of defendants to praecipe (omitted in printing)	954	
Clerk's certificate (omitted in printing)	956	
Statement of points to be relied upon, Case No. 184	958	481
Statement of points to be relied upon, Case No. 185	965	485
Order noting probable jurisdiction	972	487

[fol. a] [Caption omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 6062-Civil

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, dba Douglas Optical; and ORAN RIPS, Plaintiffs,

vs.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma; G. O. Grant, County Attorney of Adair County, Oklahoma; Robert H. Balfour, County Attorney of Alfalfa County, Oklahoma; James L. Clark, County Attorney of Atoka County, Oklahoma; Gene H. Sharp, County Attorney of Beaver County, Oklahoma; C. A. Back, Jr., County Attorney of Beckham County, Oklahoma; W. A. Richardson, County Attorney of Blaine County, Oklahoma; R. H. Mills, County Attorney of Bryan County, Oklahoma; R. L. Lawrence, County Attorney of Caddo County, Oklahoma; James V. Phelps, County Attorney of Canadian County, Oklahoma; Alvin Bruce, County Attorney of Carter County, Oklahoma; Jack Bliss, County Attorney of Cherokee County, Oklahoma; Vester V. Songer, County Attorney of Choctaw County, Oklahoma; Hiram A. Butler, County Attorney of Cimarron County, Oklahoma; Hez J. Bussey, County Attorney of Cleveland County, Oklahoma; H. M. Shirley, County Attorney of Coal County, Oklahoma; Manville Redman, County Attorney of Comanche County, Oklahoma; Hugh F. Fitzsimmons, County Attorney of Cotton County; L. O. Thomas, County Attorney of Craig County, Oklahoma; Clyde Patrick, County Attorney of Creek County, Oklahoma; Fred E. LaRue, County Attorney of Custer County, Oklahoma; Don Hampton, County Attorney of Delaware County, Oklahoma; T. J.

Ruble, County Attorney of Dewey County, Oklahoma; L. H. Clark, County Attorney of Ellis County, Oklahoma; [fol. 2] Floyd Armstrong, County Attorney of Garfield County, Oklahoma; Raymond Burger, County Attorney of Garvin County, Oklahoma; Wilson Smithen, County Attorney of Grady County, Oklahoma; John M. Amick, County Attorney of Grant County, Oklahoma; Jack Sasseen, County Attorney of Greer County, Oklahoma; Raymond Berry, County Attorney of Harmon County, Oklahoma; Earl F. Camp, County Attorney of Harper County, Oklahoma; Nat Henderson, County Attorney of Haskell County, Oklahoma; C. A. Holland, County Attorney of Hughes County, Oklahoma; Ross Rutherford, County Attorney of Jackson County, Oklahoma; Dave K. Spradling, County Attorney of Jefferson County, Oklahoma; John J. Stobaugh, County Attorney of Johnston County, Oklahoma; Ned Looney, County Attorney of Kay County, Oklahoma; Karl D. Cunningham, County Attorney of Kingfisher County, Oklahoma; Lloyd Reeder, County Attorney of Kiowa County, Oklahoma; Wayne Russell, County Attorney of Latimer County, Oklahoma; Joseph W. Foster, County Attorney of LeFlore County, Oklahoma; Tom J. Amis, County Attorney of Lincoln County, Oklahoma; H. Dale Cook, County Attorney of Logan County, Oklahoma; Floyd Miller, Jr., County Attorney of Love County, Oklahoma; L. D. Harris, County Attorney of McClain County, Oklahoma; Bascom Coker, County Attorney of McCurtain County, Oklahoma; Clark Nichols, County Attorney of McIntosh County, Oklahoma; George Camp, County Attorney of Major County, Oklahoma; O. C. Barnes, County Attorney of Marshall County, Oklahoma; Lewis F. Grayson, County Attorney of Mayes County, Oklahoma; Millard Lowrance, County Attorney of Murray County, Oklahoma; Ernest Anthis, Jr., County Attorney of Muskogee County, Oklahoma; W. E. Rice, County Attorney of Noble County, Oklahoma; Hubert Marlow, County Attorney of Nowata County, Oklahoma; Hugh Coleman, County Attorney of Okfuskee County, Oklahoma; Edgar R. Boatman, County Attorney of Okmulgee County, Okla- [fol. 3] homa; R. Havens, County Attorney of Osage

County, Oklahoma; Robt. H. Reynolds, Jr., County Attorney of Ottawa County, Oklahoma; Lewis Raba, County Attorney of Pawnee County, Oklahoma; Robert M. Murphy, County Attorney of Payne County, Oklahoma; Homer W. Neece, County Attorney of Pittsburg County, Oklahoma; W. Barney Ward, County Attorney of Pontotoc County, Oklahoma; Lloyd J. Henry, County Attorney of Pottawatomie County, Oklahoma; Kenneth S. Lawson, County Attorney of Pushmataha County, Oklahoma; Leroy Vick, County Attorney of Roger Mills County, Oklahoma; H. P. Daugherty, County Attorney of Rogers County, Oklahoma; Tom Smith, County Attorney of Seminole County, Oklahoma; Frederick D. Green, County Attorney of Sequoyah County, Oklahoma; Clinton D. Dennis, County Attorney of Stephens County, Oklahoma; Dennis Reynolds, County Attorney of Texas County, Oklahoma; Alvin Boyd, County Attorney of Tillman County, Oklahoma; Thomas J. McGoldrick, County Attorney of Wagoner County, Oklahoma; Daniel Bassett, County Attorney of Washington County, Oklahoma; E. N. Sasseen, County Attorney of Washita County, Oklahoma; Hugh D. Potts, County Attorney of Woods County, Oklahoma; J. C. Bleckley, County Attorney of Woodward County, Oklahoma; Zales Jewelry Company, a corporation, Defendants.

[fol. 4] COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION AND OTHER RELIEF, AND APPLICATION FOR TEMPORARY RESTRAINING ORDER—Filed September 2, 1953

Plaintiffs for their claim for relief against defendants allege and state:

(1) This is an action for declaratory relief pursuant to the provisions of Sections 2201 and 2202 of the Judicial Code of the United States (28 U.S.C. 2201, 2202) and for injunctive relief against the enforcement of House Bill No. 953 (Title 59, Chapter 24, Sections 941-947, inclusive, Oklahoma Statutes) pursuant to the provisions of Sections 2281 to 2284, inclusive, of the Judicial Code of the United States (28 U.S.C. 2281-2284).

(2) This action arises under the Constitution of the

United States, Article I, Section 8, and Article I, Section 10, the XIV Amendment to the Constitution of the United States, Section 1, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

(3) There is a present, actual, justiciable controversy between plaintiffs and defendants as will hereinafter more fully appear.

(4) Plaintiff Lee Optical of Oklahoma, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Oklahoma with its principal place of business in Oklahoma City, Oklahoma. Plaintiff, Oran Rips, is a citizen of the State of Oklahoma. Plaintiff, Ellis Carp, dba Douglas Optical, is a citizen of the State of Texas.

(5) Defendant, Mac Q. Williamson, is a citizen of the State of Oklahoma, residing in Oklahoma City, and is the duly elected, qualified and acting Attorney General of said State and as such is charged with the enforcement of the laws of said State. Defendants, Granville Scanland and Robert L. Wheeler, are citizens of the State of Oklahoma and are the duly elected, qualified and acting County Attorneys of Oklahoma and Tulsa Counties, Oklahoma, respectively, and are persons whose duty it is to prosecute plaintiffs for violation of House Bill No. 953 (Title 59, [fol. 5] Chapter 24, Sections 941-947, Oklahoma Statutes).

(6) Defendant, Zales Jewelry Company, is a corporation organized and existing under and by virtue of the laws of the State of Texas, and is engaged in retailing merchandise to the general public from establishments operated by it in Tulsa and Oklahoma City.

(7) All of the defendants named in the caption not heretofore specifically named and described in the body of the complaint are citizens of Oklahoma and duly elected, qualified and acting County Attorneys of the State of Oklahoma whose duty it is to enforce the laws in their respective counties and prosecute persons for violation of House Bill No. 953, and who, together with the aforesaid County Attorneys of Oklahoma and Tulsa Counties, comprise all of the County Attorneys of the seventy-seven Counties of the State of Oklahoma.

(8) Plaintiff, Lee Optical of Oklahoma, Inc., has its

principal place of business in Oklahoma City and is engaged in the business of advertising for sale and selling to the general public at retail eyeglasses, lenses, frames for eyeglasses, mountings, prisms and other optical appliances or devices and is also engaged in fitting, adjusting, adapting and applying lenses, frames, prisms and other optical appliances to the faces of persons, the duplicating, placing and replacing into frames of lenses and other optical appliances which have been prescribed, fitted or adjusted for visual correction or which are intended to aid human vision. It is what is known to the trade as a "dispensing" optician. Plaintiff, Ellis Carp d/b/a Douglas Optical, is likewise a "dispensing" optician engaged in the aforesaid activities.

(9) Plaintiff, Oran Rips, is a practicing physician in Tulsa, Oklahoma, duly licensed to practice as such by the Oklahoma State Board of Medical Examiners pursuant to the provisions of Title 59, Chapter 11, Oklahoma Statutes. At the present time, and for a number of years next preceding the filing of this complaint, plaintiff Oran Rips has specialized in the examination of eyes for glasses and for some time has maintained his office in the retail premises of defendant Zales Jewelry Company at 301 South Main, [fol. 6] Tulsa, Oklahoma, which space he occupies under a written lease dated June 17, 1953, in which lease the Zales Jewelry Company is lessor. A copy of said lease is attached hereto, marked Exhibit "A" and by such reference made a part hereof. Said plaintiff is not in the employ of any person, firm or corporation, but is engaged as an individual in the practice of his profession on his own behalf.

(10) At the 1953 Session of the Legislature of the State of Oklahoma there was enacted House Bill No. 953 (Title 59, Chapter 24, Sections 941-947, inclusive, Oklahoma Statutes). Said law was approved by the Governor of Oklahoma on June 20, 1953, and by its terms is effective September 4, 1953. A true and complete copy of said law is attached hereto, marked Exhibit "B", and by such reference made a part hereof.

(11) Plaintiffs, Lee Optical of Oklahoma, Inc., and Ellis Carp, are neither licensed physicians nor licensed optome-

trists in the State of Oklahoma and do not purport to practice as such. For some time they have maintained and now maintain places of business in the State of Oklahoma from which they have sold and are now selling to the general public at retail eyeglasses containing lenses produced pursuant to prescriptions from oculists and optometrists duly licensed under the laws of the State of Oklahoma and other states of the United States, and have also sold and are now selling lenses, prisms, frames for eyeglasses and other optical goods. In the conduct of their respective businesses plaintiffs have also rendered and now render such services as the repair of broken eyeglasses and frames, the duplication of broken eyeglass lenses, the duplication of eyeglasses and the lenses contained therein, placing and replacing lenses in frames and fitting, adjusting, adapting and applying to the face lenses, frames, prisms and other optical appliances and other similar services. In connection with such services and the sale of such merchandise, said plaintiffs have customarily maintained and now maintain window displays of eyeglasses, frames, lenses and other optical goods and have advertised and now advertise such merchandise and the services in newspapers, magazines, by radio, television and by other media of publication.

[fol. 7] (13) Since the enactment of House Bill No. 953, the defendant Granville Scanland has advised plaintiff Lee Optical of Oklahoma, Inc., and defendant Robert L. Wheeler has advised plaintiff Ellis Carp, dba Douglas Optical, that commencing with September 4, 1953, the effective date of said law, said plaintiffs must cease and desist from:

> (a) Advertising by radio, newspaper, television, window displays or by any other means the sale of spectacles, eyeglasses, lenses, frames, mountings, prisms, or any other optical appliances or devices, and
>
> (b) In any manner fitting, adjusting, adapting, or applying lenses, frames, prisms or other optical appliances to the face of any person, or duplicating or attempting to duplicate, or placing or replacing into frames, any lenses or other optical appliances which

have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision, unless in each instance each such act has been authorized by a prescription written by an oculist or optometrist licensed under the laws of Oklahoma. Said defendants have further threatened said plaintiffs with prosecution under Section 6 of said act (59 O.S. 946) [fol. 8] and 21 O.S. 10, they immediately cease and desist from engaging in each and every one of the aforesaid acts and practices. Defendant Mac Q. Williamson, as Attorney General of the State of Oklahoma, has also advised said plaintiffs that unless they immediately cease and desist from the above practices that said plaintiff will be subject to criminal prosecution under said laws.

Defendant Zales Jewelry Company has served written notice upon plaintiff Oran Rips that his lease of space in the retail premises at 301 South Main, Tulsa, Oklahoma, would be terminated on September 4, 1953, by virtue of the provisions of Section 4 of said House Bill 953 (59 O.S. 944), providing that no person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments or otherwise permit any person purporting to do eye examination or give visual care to occupy space in said retail store. A true copy of said notice of termination is attached hereto marked Exhibit "C" and by such reference made a part hereof.

(15) The fitting, adjusting, adapting or applying of lenses, frames, prisms and other optical appliances to the face of a person, and the duplicating, placing or replacing into frames of lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction or which are intended to aid human vision, involves only the application of manual dexterity, good judgment and commonly known physical principles and the employment of workmanship and skill of no greater degree than are regularly employed in semi-skilled trades. They do not involve the use or application of medical or scientific knowledge, learning, skill or extraordinary experience.

Except for the performance of such services as are defined in Section 581, Chapter 13, and Section 492, Chapter 11, Title 59, Oklahoma Statutes, and the issuance of a prescription for lenses in accordance therewith, all other acts and things done in connection with the preparation, fitting and sale of eyeglasses, lenses, frames, mountings, prisms, or other optical appliances and devices constitute commercial business are not customarily performed by oculists [fol. 9] or by optometrists excepting only optometrists who maintain retail merchandising establishments and manufacturing plants for the doing thereof. Such acts and things have no greater relation to the public health, morals, safety and general welfare than any other business involving the sale of standard commercial articles or services.

(16) The economic history of the profession of optometry has demonstrated the persistent and aggressive interest of the members thereof in the preemption to themselves of the profits resulting from the sale of merchandise connected with visual aid or correction. Contrary to the development and objectives of other professions which have sedulously avoided any merchantile advantage from their practice, optometrists have embraced the mercantile opportunities afforded by their practice with the result that in the State of Oklahoma and elsewhere great numbers of optometrists conduct their practice amid their own retail merchandising establishments, fixtures, equipment and stock in trade in prime retail locations. The preoccupation of optometrists with the commercial opportunities in optical goods has induced them to engage in militant legislative programs in the State of Oklahoma and throughout the United Sates, which under the guise of the promotion of professional ethics have increasingly enhanced their commercial, competitive position in the sale of optical goods and appliances. House Bill No. 953 is of such a character and was sponsored solely by the Association of Oklahoma Optometrists and its lobbyists, and not by the public in general nor even by the Medical Association of the State of Oklahoma, but rather is a law designed by licensed optometrists to eliminate competitors in the sale of eyeglasses and other optical goods and services and de-

prive the public, by prohibiting normal competitive advertising, of knowledge of the fair retail value of such optical goods and services.

(17) Said House Bill No. 953 is unconstitutional and void under the Constitution of the United States and Amendments thereto for the following reasons:

(a) Said statute deprives plaintiffs of their liberty and property without due process of law in violation of the XIV Amendment to the Constitution of the United States, Section 1, in that it:

[fol. 10] (i) Purports to make unlawful and criminal fitting, adjusting, adapting, applying, of lenses, frames, prisms or other optical appliances to the face of any person, duplicating or attempting to duplicate, placing or replacing into frames, lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction or which are in aid of human vision, by plaintiffs or any person except in each instance pursuant to a written prescription issued by a physical or optometrist licensed under the laws of the State of Oklahoma.

(ii) Purports to make unlawful and criminal the solicitation of the sale of spectacles, eyeglasses, lenses, frames, mountings, prisms, or any other optical appliances or devices by radio, window display, television, newspaper, or any other means of advertisement.

(iii) Purports to make it unlawful and criminal for any person, firm or corporation engaged in the business of retailing merchandise to the general public to rent space, sublease departments or otherwise permit any person performing eye examinations or giving visual care, to occupy space in such retail store.

(iv) Purports to make unlawful and criminal the fitting, adjusting, adapting or applying of lenses, frames, prisms and other optical appliances to the face of a person, thereby having the effect of prohibiting the sale thereof except upon prescription,

when, in fact, prescriptions for such merchandise and services are impracticable and unknown to any trade or profession, and physicians and optometrists licensed under the laws of Oklahoma have no special training or skill in the sale of such merchandise or the rendering of such services.

(b) Said statute impairs the obligation of contracts in violation of Article I, Section 10, of the Constitution of the United States, in that it purports to make unlawful any lease, sublease or occupancy of space by a [fol. 11] retail merchandiser in its retail store to a person purporting to perform eye examinations or give visual care.

(c) Said statute places an undue and unreasonable burden and restraint on interstate commerce in violation of Article I, Section 8, of the United States Constitution, in that it has the effect of prohibiting plaintiffs, except pursuant to prescription, from selling eyeglasses, lenses, spectacles, frames, mountings, prisms or other optical appliances or devices purchased and received by plaintiffs through the channels of interstate commerce, and from selling such eyeglasses, spectacles, lenses, frames, mountings, prisms and other optical appliances or devices in aid of human vision from their Oklahoma stores through the channels of interstate commerce to persons residing outside the State of Oklahoma.

(d) Such statute places an undue and unreasonable burden and restraint on interstate commerce in violation of Article I, Section 8, of the United States Constitution in that it restricts and prohibits the advertising of standard commercial merchandise in newspapers, magazines, over the radio, by television and other means of interstate communication.

(e) Said statute deprives plaintiffs of the equal protection of the laws guaranteed to them by Article I of the XIV Amendment to the Constitution of the United States in that it:

(i) By restricting the legal right to sell eyeglasses, spectacles, lenses, frames, mountings, prisms

and other optical appliances or devices in aid of human vision except upon written prescription from physicians and optometrists licensed under Oklahoma law, it has the effect of preempting to and monopolizing in such physicians and optometrists the sale of such standard commercial merchandise and services to the exclusion of plaintiffs and other persons similarly situated.

(ii) Singles out and prohibits the advertising for sale by any means of eyeglasses, spectacles, lenses, [fol. 12] frames, mountings, prisms and other optical appliances and devices in aid of human vision, although the advertisement of other standard merchandise is not prohibited by Oklahoma law and other prosthetic devices for the aid of defects in the human body, such as hearing aids and trusses may be advertised for sale under Section 736.1. Chapter 16, Title 59, Oklahoma Statutes.

(iii) By restricting the legal right to sell eyeglasses, spectacles, lenses, frames, mountings, prisms and other optical appliances or devices in aid of human vision except upon written prescription from physicians and optometrists licensed under Oklahoma law, when no restriction is placed upon the sale of ready-to-wear glasses equipped with convex-spherical lenses or sun-glasses equipped with plano lenses or industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser.

(iv) Has the effect of placing control of, preempting to and monopolizing in physicians and optometrists licensed under the laws of the State of Oklahoma, all trade and commerce in the foregoing merchandise and services, when, in fact, such control, preemption and monopolization has no reasonable relation to the public health, safety, morals or general welfare.

(f) Said statute contravenes the due process clause of the XIV Amendment to the Constitution of the United States in that:

(i) Although purporting to make violations of said statute a criminal offense, certain of its language and provisions are so vague, indefinite and ambiguous that neither plaintiffs nor other persons similarly situated are able to determine which acts on their part are prohibited by said statute.

(ii) It denies, impairs and disparages the inherent right of plaintiffs to contract in matters of private [fol. 13] concern in which the public at large and the public welfare, peace, health and safety are not concerned or involved.

(iii) It deprives plaintiffs of their inherent right to liberty and the pursuit of happiness and the enjoyment of the fruits of their own industry.

(iv) It has the effect of placing control of, preempting to and monopolizing in physicians and optometrists licensed under the laws of the State of Oklahoma, all trade and commerce in the aforesaid optical merchandise and services when, in fact, such control, preemption and monopolization has no reasonable relation to the public health, safety, morals or general welfare.

(v) Deprives plaintiffs of their right of free speech in prohibiting advertising of optical goods and appliances.

For all of said reasons said House Bill No. 953 is void and unconstitutional under the United States Constitution and Amendments thereto.

(18) The annual net profits of plaintiff Lee Optical of Oklahoma, Inc., in the State of Oklahoma exceeds $5,000.00, while those of plaintiff Ellis Carp are in excess of $15,000.00. The value of plaintiff Oran Rips' lease from defendant Zales Jewelry Company is at least $10,000.00. The enforcement of House Bill No. 953 by defendants Granville Scanland and Robert L. Wheeler and by other

County Attorneys in the State of Oklahoma will subject plaintiffs and each of them to unusual hardship, immediate and irreparable injury and damage for which there exists no adequate relief at law, and such enforcement unless enjoined, will cause plaintiff Lee Optical of Oklahoma, Inc., to suffer losses of at least $100.00 per day, and plaintiff Ellis Carp of $125.00 per day and will deprive plaintiff Oran Rips of all income from an established and profitable practice of his profession, to his damage in excess of $10,000.00 per annum. Unless the Court forthwith issue without notice and hearing a temporary restraining order against the defendants, plaintiffs will suffer the aforesaid immediate irreparable injury and damage, and will be subjected to arrest and criminal prosecution under said statute.

Wherefore, plaintiffs pray that this Court:

[fol 14] (1) Declare and determine said House Bill No. 953 (title 59, Chapter 24, Sections 941-947, inclusive, Oklahoma Statutes) unconstitutional and void under the Constitution of the United States and Section 1 of the XIV Amendment thereto.

(2) Enjoin defendants Granville Scanland, Robert L. Wheeler and Mac Q. Williamson and the remaining defendant County Attorneys, their agents, servants, representatives, attorneys and all other persons in concert with them, from enforcing or attempting to enforce said statute.

(3) Enjoin defendant Zales Jewelry Company from terminating or in any way cancelling its said lease to plaintiff Oran Rips.

(4) Issue a temporary restraining order, forthwith, without notice and hearing, pending the final hearing and determination of this cause upon its merits, restraining the defendants, Granville Scanland, Robert L. Wheeler and Mac Q. Williamson, or each of them, their agents, employees, representatives, attorneys and all other persons in concert with them, from enforcing or attempting to enforce said statute, and restraining defendant Zales Jewelry Company from terminating or in any way cancelling its said lease to plaintiff Oran Rips.

(5) Grant plaintiffs such other and further relief as may be just and requitable.

Dudley, Duvall & Dudley, By Duke Duvall, 1501 Liberty Bank Building, Oklahoma City, Oklahoma. [fol. 15] Stinson, Mag, Thomson, McEvers & Fizzell, By John M. Phillips, Attorneys for Plaintiffs.

Duly sworn to by T. Shanbaum. Jurat omitted in printing.

[fol. 16] EXHIBIT "A" TO COMPLAINT

Lease Agreement

This agreement, made and entered into by and between: Zale Jewelry Company, Inc., a corporation, party of the first part, hereinafter known as "lessor" and Dr. Oran Rips, party of the second part, hereinafter known as "Lessee" witnesseth: whereas, the Lessor has the occupancy of a building known as 301 S. Main in Tulsa, Oklahoma, and whereas, Lessee desires to rent space in said building, now, therefore, in consideration of the mutual covenants, promises and agreements herein contained, Parties stipulate and agree as follows, to-wit;

1. Lessor does hereby lease to the Lessee a room on the balcony of the building at 301 S. Main in Tulsa, Oklahoma, of the approximate size of 7′ x 15′ to be used by Lessee as an office, together with a waiting room adjacent thereto of the approximate size of 8′ x 10′.

2. Said lease shall commence on the 17th day of June, 1953, and shall expire at midnight on the last day of March, 1956.

3. Lessee agrees to pay as rental for said space, the sum of One Hundred Dollars ($100.00) per month, payable on the 1st day of each month in advance. The rental from June 17, 1953, to July 1, 1953, shall be on a pro-rated basis.

4. Lessee agrees to not engage in any business in competition with the business of the Lessor conducted on said

premises. Lessee is not to engage in the sale of any merchandise, and shall operate independent of the operation of the business of the Lessor.

5. In the event Lessee fails to make payments of rent, as herein provided, or otherwise violates the terms of this Lease, Lessee agrees to give immediate possession of said premises, and failure on his part to do so, shall enable the Lessor to take such action as the law provides to terminate said Lease and termination of possession of said premises.

[fol. 17] EXHIBIT "B" TO COMPLAINT

AN ACT

Enrolled House Bill No. 953

By: Harkey (McCurtain), Ham, Sandlin, Welch (McCurtain), Vandiver, of the House, and Collins, Hope, Cooper, Cowden, Price and Field, of the Senate.

An act relating to visual care; defining terms; prohibiting dishonest and dangerous practices in the sale of optical goods and devices; prohibiting discrimination; making the act cumulative to other laws; making violation a misdemeanor authorizing injunction against violators.

Be it enacted by the people of the State of Oklahoma:

Section 1. It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, of Title 59, Oklahoma Statutes and that no unqualified person shall be permitted to visually correct for compensation the eyes of another.

Section 2. It shall be unlawful for any person, firm, corporation, company, or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes 1951, to fit, adjust, adapt, or to in manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt

to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designated to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951 may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses.

Section 3. It shall be unlawful for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms, or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction. Provided, however, that the provisions of this Act shall not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor of said commodity or material; nor shall anything in this Act prevent ethical education publicity or advertising by legally qualified health groups that does not violate presently existing laws of Oklahoma, nor prevent the proper use of ethical, professional notices. Nothing in this Act shall prohibit the sale of ready-to-wear glasses

equipped with convexspherical lenses nor sunglasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser.

Section 4. It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye examination or visual correction to receive or accept any rebate, kick-back, reward or premium from any optical company or any other person, firm or corporation dealing in optical goods, appliances or materials, or knowingly allow or permit any person engaged in or interested in the sale of such optical goods, appliances, or materials, to solicit business for any person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes. It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of a person, firm, corporation, lay body, organization, group or lay person and it shall be likewise unlawful for any corporation, lay body, organization, group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of a person licensed under the provisions of Chapter 11 or 13 of Title 59, Oklahoma Statutes 1951, provided that this sentence shall not apply to the University of Oklahoma School of Medicine and Hospitals, or —— ——.

[fol. 18] EXHIBIT "C" TO COMPLAINT

September 1, 1953.

Dr. Oran Rips,
301 South Main,
Tulsa, Oklahoma.

Dear Dr. Rips:

We sincerely regret that by virtue the provisions of House Bill #953 recently adopted by the Oklahoma Legislature,

we are prohibited from leasing space in our retail store to any person performing eye examinations or giving visual care.

Since the lease agreement covering the letting of your office space within our store has thus been unlawful, we are compelled to notify you, effective September 4, 1953, the effective date of House Bill #953, we must terminate your lease of this space, and we hereby request that on such date you surrender such space to this company.

Very truly yours, Zale Jewelry Company, Ben A. Lipshy, Treasurer.

BAL:mb.

[fol. 19] [File endorsement omitted.]

[fol. 20] In the United States District Court

[Title omitted]

Temporary Restraining Order—Filed September 2, 1953

This cause came on to be heard on the 2nd day of September, 1953, and it appearing to the Court that defendants are about to commit the acts hereinafter referred to and that they will do so unless restrained by order of this Court, and that immediate and irreparable injury, loss and damage will result to plaintiffs before notice can be served and a hearing had on plaintiffs' motion for a preliminary injunction, in that plaintiffs will be subject to arrest and criminal prosecution, and to extensive loss of business as set forth in the complaint in detail, in a substantial amount,

It is ordered that defendants, their agents, servants, employees, assistants, deputies and attorneys and all persons in active concert and participation with them, be and they are hereby restrained from enforcing or attempting to enforce House Bill No. 953 (Oklahoma Session Laws [fol. 21] 1953, Title 59, Chapter 24, Sections 941-947, inclusive, Oklahoma Statutes), excepting the defendant Zales

Jewelry Company, and that such defendant be restrained from terminating or in any way cancelling its lease to plaintiff Oran Rips; provided that plaintiffs first give security in the sum of $1,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, such bond to be approved by the Court or by the Clerk of the Court.

It is further ordered that this order expire within 30 days after entry, unless within such time the order for good cause shown is extended for a like period, or unless the defendants consent that it may be extended for a longer period.

It is further ordered that plaintiffs' motion for a preliminary injunction be set down for hearing on the 30th day of September, 1953, at Ten A. M.

Issued at 3:30 P.M., September 2, 1953.

W. R. Wallace, United States District Judge.

[fol. 22] [File endorsement omitted.]

[fol. 23] In the United States District Court

[Title omitted]

Amended Answer and Counterclaim of the Defendant, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the Defendant County Attorneys Herein—Filed October 30, 1953

Answer

Come now the defendant, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the defendant county attorneys herein, and in answer to the complaint filed in the above cause allege and state:

1. The complaint fails to state a claim against defendants upon which relief can be granted.

2. Defendants admit the material allegations of fact and of law set forth in Paragraphs 1 to 3 of the complaint, and specifically admit that "There is a present, actual, justiciable controversy between plaintiffs and defendants," but deny that House Bill No. 953 (59 Okl. St. Ann. §§ 941 to 947), referred to in the complaint, violates the constitutional provisions mentioned therein, and allege that said house bill is constitutional and valid in all respects and was enacted as a proper exercise of the police power of the state in the interest of the public health and welfare.

[fol. 24] 3. Defendants admit the material allegations of fact set forth in Paragraph 4 of the complaint, and allege that "Lee Optical of Oklahoma, Inc.," was incorporated under and by virtue of the laws of the State of Oklahoma on June 24, 1953.

4. Defendants admit the material allegations of fact set forth in Paragraphs 5, 6 and 7 of the complaint.

5. Defendants admit the material allegations of fact set forth in Paragraph 8 of the complaint, but allege that the acts of Lee Optical of Oklahoma, Inc., and Eliis Carp, d/b/a Douglas Optical, as set forth in said paragraph

(1) in so far as said acts include

(a) the measuring, adapting, fitting, preparing, dispensing, or adjusting of lenses, spectacles, eyeglasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomolies of the human eye, without a written prescription, or its duplicate, such as is provided for in Section 2 of said house bill, or

(b) the duplicating or attempting to duplicate, or the placing or replacing into frames, of any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision, without having the prescription, or duplicate thereof, in which the prescribed lenses or other optical appliances were so prescribed, or

(c) the giving of treatment or training designed to aid human vision, or

(d) the representing or holding themselves out to the public as being qualified to do any of the acts above mentioned in Subparagraphs (a), (b) or (c), [fol. 25] violate the provisions of said House Bill No. 953 and/or Chapters 11 and 13 of Title 59, Oklahoma Statutes 1951, and

(2) in so far as said acts include

(a) the solicitation of "the sale of spectacles, eyeglasses, lenses, frames, mountings, prisms or any other optical appliances or devices [for visual care or correction], eye examinations or visual services, by radio, window display, television, telephone directory, display advertisement, or by any other means of advertisement," or

(b) the use of "any other method or means of baiting, persuading or enticing the public into buying spectacles, eyeglasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction,"

violate the provisions of House Bill No. 953.

6. Defendants neither admit nor deny the material allegations of fact set forth in Paragraph 9 of the complaint relating to the plaintiff, Oran Rips, and to the defendant, "Zales Jewelry Company," and allege that defendants have no information relating thereto.

7. Defendants admit the material allegations of fact set forth in Paragraph 10 of the complaint, with the exception of that part which states that House Bill No. 953 "by its terms is effective September 4, 1953," and allege that said bill did not become effective until September 5, 1953.

8. Defendants admit the material allegations of fact set forth in Paragraph 11 of the complaint, but allege that the acts of Lee Optical of Oklahoma, Inc., and Ellis Carp, d/b/a Douglas Optical, as set forth in said paragraph, in so far as same include acts, such as are referred to [fol. 26] in Subparagraphs 1 and 2 of Paragraph 5 hereof, violate the provisions of House Bill No. 953 and/or Chapters 11 and 13 of Title 59, Oklahoma Statutes 1951.

9. In relation to the material allegations of fact set forth in Paragraph 13 of the complaint, defendants admit and

allege that the county attorneys of Oklahoma intend to enforce the provisions of House Bill No. 953, and that the Attorney General of Oklahoma intends to advise all persons violating said bill that they are subject to criminal prosecution.

10. Defendants neither admit nor deny the material allegations of fact set forth in Paragraph 14 of the complaint relating to the defendant, "Zales Jewelry Company," and to the plaintiff, "Oran Rips," and allege defendants have no information relating thereto.

11. Defendants deny the material allegations of fact, if any, as well as the conclusions of law set forth in Paragraphs 15 and 17 of the complaint.

12. Defendants neither admit nor deny the material allegations of fact set forth in Paragraph 18 of the complaint and allege that they have no information relating thereto, but deny the conclusions of law set forth therein.

Wherefore, premises considered, defendants respectfully ask the court to decline to declare and determine House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature to be unconstitutional and void, as prayed for in the complaint, but on the other hand to hold the same constitutional and valid; to also decline to issue the writ of injunction prayed for therein as against these defendants, to vacate the temporary restraining order heretofore issued against defendants, to tax the cost of this action against plaintiffs, and to grant defendants such other and further relief as the court may deem just and proper.

[fol. 27] COUNTERCLAIM

For counterclaim against the above plaintiffs, these defendants adopt and incorporate herein the allegations of their foregoing answer and the admitted allegations of the complaint, and allege that House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941 to 947) is a valid and constitutional statute of the State of Oklahoma enacted as a proper exercise of the police power of the state in the interest of public health and welfare, and further allege that plaintiffs are now and

have been violating the provisions of said house bill and unless enjoined by this court will continue to do so.

Wherefore, these defendants respectfully ask the court for an order declaring House Bill No. 953 to be valid and constitutional in all respects, and that the court issue its order permanently enjoining plaintiffs from future violations of the provisions of said house bill.

Mac Q. Williamson, Attorney General of Oklahoma,
Fred Hansen, First Assistant Attorney General,
James C. Harkin, Assistant Attorney General.
Fred Daugherty, Paul Harkey, Leroy Powers, Attorneys for defendants.

[fol. 28] *Duly sworn to by Mac Q. Williamson. Jurat omitted in printing.*

[fol. 29] [File endorsement omitted.]

[fol. 30] In The United States District Court

[Title omitted]

Plaintiffs' Reply to Defendants' Counterclaim—Filed October 26, 1953

Plaintiffs, for their reply to defendants' counterclaim, deny the allegations thereof for the reasons set forth in their complaint.

Dudley, Duvall & Dudley, By Duke Duvall; Stinson, Mag, Thomson, McEvers & Fizzell, By Dick H. Woods, John M. Phillips, Attorneys for Plaintiffs.

[fol. 31] Certificate of Service—(Omitted in printing)

[fols. 32-32a] [File endorsement omitted.]

[fol. 33] IN THE UNITED STATES DISTRICT COURT

No. 6002 Civil

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, dba Douglas Optical; and Oran Rips, Plaintiffs,

vs.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma; et al., Defendants.

DEFENDANTS' PROPOSED JUDGMENT AND DECREE—Filed March 16, 1954

This cause having come on for further and final hearing, and the issues therein having been tried before the court without a jury, and the court having heard the evidence and argument of counsel, having examined the pleadings and trial briefs, and having on March 1, 1954 rendered its written opinion in this cause, upon due consideration is of the opinion that the plaintiffs, Lee Optical of Oklahoma, Inc., a corporation, Ellis Carp, dba Douglas Optical, and Oran Rips, as well as the defendants, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the defendant county attorneys, are entitled to certain of the declaratory and injunctive relief respectively prayed for in the complaint and in the amended answer and counterclaim filed herein:

it is, therefore, adjudged and declared:

(1) That Sections 2, 3 and 4 of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941 to 947) are unconstitutional and void under the Constitution of the United States and Section 1 of the XIV Amendment thereto in the following particulars, to-wit:

[fol. 34] (a) Those portions of Section 2, which make it "unlawful for any person, firm, corporation, company or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59,

Oklahoma Statutes 1951, to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority of such a licensee.

(b) That portion of Section 3 which makes it unlawful "to solicit the sale of * * * frames, mountings, * * * or any other optical appliances."

(c) That portion of Section 4 which provides that: "No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sub-lease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store."

(2) That said House Bill No. 953 is constitutional and valid in all respects other than as set forth in Subparagraphs (a), (b) and (c) of Paraagraph (1), supra.

It is further ordered, adjudged and decreed:

(1) That the temporary restraining order entered in this cause on September 2, 1953, be and the same is hereby made permanent and perpetual against the defendants, Mac Q. Williamson, Granville Scanland, Robert L. Wheeler, and the remaining defendants who are county attorneys in the State of Oklahoma, their agents, servants, employees, assistants, deputies and attorneys and all persons in active concert and participation with them, in so far as it restrains them from enforcing or attempting to enforce against the plaintiffs the provisions of House Bill No. 953 (59 Okl. St. Ann. §§ 941 to 947) declared and adjudged unconstitutional and void herein, and they are hereby permanently enjoined from doing so.

(2) The temporary restraining order is further made permanent and perpetual against the defendant, the

Zales Jewelry Company, a corporation, in so far as the [fol. 35] same restrains the said defendant from cancelling or terminating its lease to plaintiff Rips on the ground of violation of the provisions of House Bill No. 953 (59 Okl. St. Ann. §§ 941 to 947) declared and adjudged unconstitutional and void herein, and it is hereby permanently enjoined from doing so.

(3) That the plaintiffs, Lee Optical of Oklahoma, Inc., a corporation, and Ellis Carp, dba Douglas Optical, and each of them, be and the same are hereby permanently and perpetually enjoined and restrained from violating any of the provisions of Section 3 or Section 4 of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 943 and 944) which:

(a) Make it unlawful for any person, firm, company, corporation, or partnership "to solicit the sale of spectacles, eye glasses, lenses, * * * prisms, * * * by radio, window display, television, telephone directory display advertising, or by any other means of advertisement"; or

(b) Make it unlawful for any person, firm, company, corporation, or partnership "to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction"; or

(c) Make it unlawful for any corporation, lay body, organization, group, or lay person "in any manner to make an eye examination or perform any visual correction through the means of engaging the services, on a salary, commission, or any other compensatory basis, of a person licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951."

It is further ordered, adjudged and decreed that the costs of this proceeding be taxed as follows: To the plaintiff, Lee Optical of Oklahoma, Inc., a corporation, one-fourth; to the plaintiff, Ellis Carp, dba Douglas Optical, one-fourth; to the defendant, Zales Jewelry Company, one-fourth; and

to the defendant, Attorney General and county attorneys, one-fourth.

Dated at Oklahoma City, Oklahoma, this —— day of March, 1954.

—— ——, Judge.

[fol. 36] [File endorsement omitted.]

[fol. 37] IN THE UNITED STATES DISTRICT COURT

No. 6002 Civil

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, dba Douglas Optical; and Oran Rips, Plaintiffs,

vs.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al., Defendants.

Before Murrah, Circuit Judge, and Vaught and Wallace, District Judge

JUDGMENT AND DECREE—Filed March 29, 1954

This cause having come on for further and final hearing, and the issues therein having been tried before the Court without a jury, and the evidence of all of the parties hereto having been heard, and the cause having been argued and briefed by counsel, and the Court after being fully advised, having heretofore filed its written opinion herein, which opinion constitutes the Court's findings of fact and conclusions of law,

Now it is this date declared, ordered, adjudged, and decreed as follows:

(1) That the following portions of House Bill No. 953 (Title 59, Chapter 24, Sections 941-947, inclusive, Oklahoma [fol. 38] Statutes) are unconstitutional and void, to-wit:

(a) Those portions of Section 2 (Title 59, Chapter 24, Section 942, Oklahoma Statutes), which makes it

unlawful for any person not a licensed optometrist or ophthalmologist "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the fact of a person . . ." or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision . . ." except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist;

(b) That portion of Section 3 (Title 59, Chapter 24, Section 943, Oklahoma Statutes), which makes it unlawful "to solicit the sale of . . . frames, mountings . . . or any other optical appliances";

(c) That portion of Section 4 (Title 59, Chapter 24, Section 944, Oklahoma Statutes), which provides that "No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sub-lease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store".

[fol. 39] (2) That the temporary restraining order entered in this cause on September 2, 1953, be and the same is hereby made permanent and perpetual against the defendants Mac Q. Williamson, Granville Scanland, Robert L. Wheeler, and the remaining defendants who are county attorneys in the State of Oklahoma, their agents, servants, employees, assistants, deputies and attorneys and all persons in active concert and participation with them, insofar as it restrains them from enforcing or attempting to enforce against the plaintiffs the provisions of House Bill 953 (Title 59, Chapter 24, Sections 941-947, Oklahoma Statutes) declared and adjudged unconstitutional and void herein, and they are hereby permanently enjoined from doing so.

(3) The temporary restraining order is further made permanent and perpetual against the defendant Zales Jewelry Company, a corporation, insofar as the same restrains the said defendant from cancelling or terminating its lease to plaintiff Rips on the ground of violation of the provisions of House Bill 953 (Title 59, Chapter 24, Sections 941-947, Oklahoma Statutes), declared and adjudged uncon-

stitutional and void herein, and it is hereby permanently enjoined from doing so.

(4) The plaintiffs and their surety are forever discharged and released from any and all liability by reason of their restraining or injunction bond given in this cause and the same is for naught held.

(5) The counterclaim of the defendant county attorneys and attorney general is held in abeyance, but jurisdiction of this cause is retained for the purpose of giving full effect to this judgment and for the purpose of making such further and other orders and decrees, or taking such further action, if any, as may become necessary or appropriate to carry out [fol. 40] and enforce the Court's judgment.

(6) The costs of this action are hereby assessed against the defendant county attorneys and attorney general.

Dated at Oklahoma City, Oklahoma, this 29 day of March, 1954.

W. R. Wallace, Judge; Edgar S. Vaught, Judge.

[File endorsement omitted.]

[fol. 41] In the United States District Court

[Title omitted]

Petition for Appeal—Filed May 17, 1954

Considering themselves aggri-ved by the final judgment and decree of this court, entered and filed on March 29, 1954, the defendants herein, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the seventy-seven County Attorneys of the State of Oklahoma, do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final judgment and decree, and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said defendants; and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based, duly authenti-

cated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted, Mac Q. Williamson, Attorney General of Oklahoma; Fred Hansen, First Assistant Attorney General, Attorneys for Defendants-Appellants.

[fol. 42] [File endorsement omitted.]

[fol. 43] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 17, 1954

Mac Q. Williamson, Attorney General of the State of Oklahoma, and the seventy-seven County Attorneys of the State of Oklahoma, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this court in this cause, entered and filed on March 29, 1954, and from each and every part thereof, and having presented their assignment of errors and prayer for reversal and their statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be, and the same is hereby, allowed as prayed for.

It is further ordered that the amount of the appeal bond be, and the same is hereby, fixed in the sum of Five-hundred ($500.00) Dollars with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law.

W. R. Wallace, District Judge; Alfred P. Murrah, Circuit Judge; Edgar S. Vaught, District Judge.

May 17th, 1954.

[fol. 44] [File endorsement omitted.]

[fols. 45-46] Bond on Appeal for $500.00 approved and filed May 17, 1954 omitted in printing.

[fols. 47-49] Citation in usual form showing service omitted in printing.

[fol. 50] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed May 17, 1954

Mac Q. Williamson, Attorney General of the State of Oklahoma, and the seventy-seven County Attorneys of Oklahoma, defendants in the above entitled cause, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment and decree of the United States District Court entered and filed on March 29, 1954.

The United States District Court erred:

1. In holding that the following portions of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947)are unconstitutional and void:

> Those portions of Section 2 (59 Okl. St. Ann. § 942) which make it unlawful for any person not a licensed optometrist or ophthalmologist "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted [fol. 51] or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority of an Oklahoma licensed ophthamologist or optometrist;

2. In holding that the following portion of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947) are unconstitutional and void:

> That portion of Section 3 (59 Okl. St. Ann. § 943), which makes it unlawful "to solicit the sale of * * * frames, mountings * * * or any other optical appliances";

3. In holding that the following portions of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947) are unconstitutional and void:

> That portion of Section 4 (59 Okl. St. Ann. § 944), which provides that "No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sub-lease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store."

4. In permanently enjoining the defendants, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the seventy-seven County Attorneys of the State of Oklahoma from enforcing or attempting to enforce against the plaintiffs the provisions of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947) declared and adjudged unconstitutional and void as above set forth.

5. In permanently enjoining the defendant, Zale's Jewelry Company, a corporation, from cancelling or terminating its lease to the plaintiff, Oran Rips, on the ground of violation of the provisions of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947) declared and adjudged unconstitutional and void as above set forth.

[fol. 52] 6. In holding in abeyance the counter-claim of the defendants, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the seventy-seven County Attorneys, and failing to declare the remaining portions of House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947) to be constitutional and

valid and enjoining the plaintiffs from violating the provisions of the same.

Wherefore, the defendants above named pray that final judgment and decree of the United States District Court be reversed and House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (59 Okl. St. Ann. §§ 941-947) be declared and adjudged to be constitutional and valid in all of its provisions, and plaintiffs be enjoined from violating any of the provisions of same, and for such other relief as the court may deem fit and proper.

Mac Q. Williamson, Attorney General of Oklahoma;
Fred Hansen, First Assistant Attorney General,
Attorneys for Defendants-Appellants.

[fol. 53] [File endorsement omitted.]

[fols. 54-56] Statement Required by Paragraph Two, Rule Twelve of the Rules of the Supreme Court of the United States (omitted in printing)

[fols. 57-114] Certificate of Service and Notice of Appeal—(omitted in printing)

[fol. 115] In the United States District Court

[Title omitted]

Petition for Appeal—May 25, 1954

Lee Optical Company of Oklahoma, Inc. and Ellis Carp, plaintiffs in the above-entitled cause, considering themselves aggrieved by the final judgment and decree of this Court entered on the 29th day of March, 1954, do hereby pray an appeal from said final judgment and decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, plaintiffs present to

this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein plaintiffs consider the judgment erroneous are set forth in the Assignment of Errors and Prayer for Reversal accompanying this petition and to which reference is hereby made.

Plaintiffs pray that their appeal may be allowed; that citation be issued in accordance with law; that an order be [fol. 116] made with respect to the appeal bond to be given by said plaintiffs; that a transcript of the record, proceedings and documents upon which said final judgment and decree was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules of said Court in such cases made and provided.

Dated May 25, 1954.

Duke Duvall, 1501 Liberty Bank Building, Oklahoma City 2, Oklahoma; John M. Phillips, Dick H. Woods, Nine West Tenth Street, Kansas City 5, Missouri, Attorneys for Plaintiffs.

[fol. 117] In the United States District Court

[Title omitted]

Assignment of Errors and Prayer for Reversal—May 25, 1954

Plaintiffs, Lee Optical of Oklahoma, Inc. and Ellis Carp, in connection with their Petition for Appeal to the Supreme Court of the United States, hereby assign error to the record and proceedings and the entry of the final judgment and decree in the District Court on March 29th, 1954, in the above-entitled cause and state that in the entry of the final judgment and decree the District Court committed error to the prejudice of plaintiffs in the following particulars:

1. The Court erred in failing to find and declare that the portion of Section 3 of House Bill No. 953 (59 Okl. St. Ann. § 943) that makes it unlawful for any person "* * * to

solicit the sale of spectacles, eyeglasses, lenses * * * prisms * * * by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; * * *" violates Article I, Section 8, of the Constitution of the United States and the "equal protec-[fol. 118] tion" and "due process" clauses of the XIV Amendment thereto.

2. The court erred in refusing to admit in evidence plaintiffs' offered Exhibit No. 2, the same being a letter from W. S. Farmer, O.D. to Oklahoma optometrists, dated March 13, 1953, a copy of which is attached hereto as Appendix "A".

Wherefore, plaintiffs pray that the final judgment and decree of the District Court may be reversed to the extent that it is inconsistent with the errors herein assigned by plaintiffs, and for such other and further relief as the Court may deem just and proper.

Dated May 25, 1954.

Duke Duvall, 1501 Liberty Bank Building, Oklahoma City 2, Oklahoma; John M. Phillips, Dick H. Woods, Nine West Tenth Street, Kansas City 5, Missouri, Attorneys for Plaintiffs.

[fol. 119] Exhibit A omitted. Printed side page 885—infra.

[fols. 120-129] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 6002-Civil

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, dba Douglas Optical; and Oran Rips, Plaintiffs,

vs.

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma; et al., Defendants.

Before Murrah, Circuit Judge, and Vaught and Wallace, District Judges.

Wallace, District Judge. (Chief Judge Vaught concurring.)
OPINION—Filed March 1st, 1954

The plaintiffs bring this action under the Federal Declaratory Judgment Act[1] and challenge the constitutionality of certain provisions found in the recent Oklahoma Enactment dealing with the regulation of "visual care".[2] The statute subject to attack is commonly referred to as Enrolled House Bill No. 953 and is entitled:

> "An Act relating to visual care: Defining terms; prohibiting dishonest and dangerous practices in the sale of optical goods and devices; prohibiting discrimination; making the Act cumulative to other laws; making violation a misdemeanor authorizing injunction against violators."

[fol. 130] Plaintiffs, Carp, an individual, and Lee Optical Company, an Oklahoma corporation, are "dispensing opti-

---

[1] 28 U.S.C.A. §§ 2201, 2202. In addition plaintiffs request an injunction against enforcement of this State statute; this necessitates the three judge court provided for in § 2281.

[2] 59 Okla. St. Ann. §§ 941-947 (1951).

cians";[3] the other plaintiff, Rips, is an ophthamologist, duly licensed to practice in Oklahoma, who offices in Tulsa, Oklahoma, in space rented from the Zales Jewelry Company.

---

[3] The dispensing optician is both a craftsman and a merchant. He maintains a complete stock of frames from which the customers may make selections; these frames vary in size, shape, color and adornment. In order to fit the frames (and completed eyeglasses) to the customer's face he must have some artisan skill related to the science of optics and must have some knowledge of optical terms. As observed by A. D. Hill, a member of the National Guild of Prescription Opticians, and a Master in Ophthalinic Optics, a dispensing optician, in response to a question on just what his duties included: "A. I receive ophthalmic prescriptions from the ophthalmologists, and in very rare instances optometrists; do the technical work which involves measuring the distance between the pupils, commonly known as P.D., aiding in the selection of a frame, and of course in many cases it is a matter of styling with women, and some men are a little bit particular about what type of frame they wear; so actually it's a combination of technical work plus merchandising." (Tr. 77)

In addition to the dispensing optician the field of visual care has three other definable divisions. (1) The ophthamologist, a dulyy licensed medical doctor who specializes in the care of the eyes; (2) The optometrist, a quasi-professional who is trained to examine the eyes for refractive error, and at the same time recognize but not treat diseases of the eye, and who acts also as craftsman and merchant in filling prescriptions for eyeglasses; (3) The optician (or optical supplier) who is a skilled artisan qualified to actually grind lenses and perform other tasks which the dispensing optician may not be equipped to perform.

Plaintiffs Carp and Lee Optical direct their constitutional criticisms at parts of sections 2 and 3 of the instant Act;[4]

---

[4] Section 2 states: "It shall be unlawful for any person, firm, corporation, company, or partnership * * * (not an Oklahoma licensed ophthalmologist or optometrist) to fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that * * * (an Oklahoma licensed ophthalmologist, a duly licensed medical doctor who specializes its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses."

Section 3 provides: "It shall be unlawful for any person, firm, company, corporation or partnership to solicit the sale of spectacles, eye glasses, lenses, frames, mountings, prisms or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; or to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eye glasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction. Provided, however, that the provisions of this Act shall not

[fol. 131] plaintiff, Dr. Rips, questions a portion of section 4.[5]

[fol. 132] It is recognized, without citation of authority, that all legislative enactments are accompanied by a presumption of constitutionality; and, that the court must not

render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor of said commodity or material; nor shall anything in this Act prevent ethical education publicity or advertising by legally qualified health groups that does not violate presently existing laws of Oklahoma, nor prevent the proper use of ethical, professional notices. Nothing in this Act shall prohibit the sale of ready-to-wear glasses equipped with convexspherical lenses nor sun-glasses equipped with plano lenses nor industrial glasses and goggles with plano lenses used for industrial eye protection when sold as merchandise at any established places of business and where the selection of the glasses is at the discretion of the purchaser."

[5] Section 4 provides: "It shall be unlawful for any optometrist, physician or other person doing, or purporting or pretending to do eye examination or visual correction to receive or accept any rebate, kick-back, reward or premium from any optical company or any other person, firm, or corporation dealing in optical goods, appliances or materials, or knowingly allow or permit any person engaged in or interested in the sale of such optical goods, appliances, or materials, to solicit business for any * * * (Oklahoma licensed ophthalmologist or optometrist). It shall be unlawful for any optometrist, physician, or other person to make an eye examination, or do visual correction in any manner, either directly or indirectly as an employee or associate of a person, firm, corporation, lay body, organization, group or lay person and it shall be likewise unlawful for any corporation, lay body, organization group or lay person in any manner to make an eye examination or perform any visual correction through the means of engaging the services on a salary, commission or any other compensatory basis of * * * (an Oklahoma licensed ophthalmologist or optometrist) provided that this sentence shall not apply to the University of Oklahoma School of Medicine and

by decision invalidate an enactment merely because in the court's opinion the legislature acted unwisely. Likewise, where the statute touches upon the public health and welfare, the statute cannot be deemed unconstitutional class legislation, even though a specific class of persons or businesses is singled out, where the legislation in its impact is free of caprice and discrimination and is rationally related to the public good. A court only can annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory." (Hospitals, or to a bona fide resident physician of a licensed hospital. *No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store.* Nothing in this Section shall prohibit " " " (an Oklahoma licensed opthalmologist or optometrist) from organizing or maintaining a professional association with other persons so licensed." (Constitutional objection raised to portion emphasized.)

As phrased in the Court's syllabus in Adwon v. Oklahoma Retail Grocers Ass'n., Inc. (1951) 204 Okla. 199, 228 P. 2d 376, 377; "The Legislature is itself the judge of the conditions which warrant legislative enactments, and they are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary, capricious, and unreasonable, and hence irreconcilable with the conception of due process of law."

As observed by Mr. Justice Burton in the recent case of Salsburg v. State of Maryland (No. 38—October Term, 1953, p. 8, fn. 9): " '. . . It is . . . a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power.' Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 104. 'A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to

The Attorney General, in urging the validity of the [fol. 133] Act in question, emphasizes that the general purpose and intent of the Act, as evidenced by the title's broad scope, is to make certain that the people of Oklahoma receive the best possible visual care;[7] and, argues that to achieve such a goal it is imperative that the entire field of visual care (or responsibility therefor) be under the direct supervision and administration of professional practitioners (either physicians or optometrists) with all non-licensed artisans and commercial interests prohibited from activity except pursuant to professional written prescription authority.

Unquestionably, many aspects of the field of visual care are of sufficient public interest to warrant the operation of police power authority, and many regulatory measures directed toward protecting the public in regard to eye care have been judicially sanctioned.[8] However, the manner and extent to which the definable segments which compose the entire field of visual care can be controlled, like all other objects of legislative regulation, is limited by that line wherein to cross-over is to step into the area of arbitrari- [fol. 134] ness, unreasonableness and lack of rationality between the proposed control and the actual welfare of the public. Significantly, the "field of visual care", in its broadest aspect, occupies a rather unique position. The services rendered therein include those exclusively profes-

justify it.' Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580, 584. See also, Middleton v. Texas Power & Light Co., 249 U. S. 152, 157-158; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78-79."

[7] This distinguishes the instant case from Palmer v. Smith (1948) 229 N.C. 612, 51 S.E. 2d 8 and Kindy Opticians, Inc. v. Michigan State Board of Examiners (1939) 291 Mich. 152, 289 N.W. 112, inasmuch as the primary issue before those courts was whether certain artisan practices constituted a practice of optometry.

[8] See, for example, Roschen v. Ward, Attorney General of the State of New York (1929) 279 U. S. 337 ——, S. Ct. ——; Commonwealth v. Kresge Company (1929) —— Mass. ——; 166 N.E. 558; Ritholz v. Commonwealth (1954) —— Va. ——, 35 S.E. 2d 210.

sional, those quasi-professional, those artisan and those strictly mercantile in character; and, each of these services has evolved into separate and distinct class of private endeavor.[9]

Although, the artisan, the merchant, as well as the professional may be regulated in any field where the regulated efforts bear directly upon the public health and welfare,[10] none can be restricted where the particular acts regulated do not involve matters of public interest; and, where a general field of endeavor is specifically composed of definable activities, some of which pertain to public health and welfare and other of which do not, the non-

[9] The original of the ophthalmologist, the pure professional, is identical to that of other medical doctors, or physicians; however, he has specialized in eye care. The optometrist, the quasi-professional, evolved from an artisan-merchant beginning to the place where certain professional training and experience has qualified him to examine eyes for refraction and recognize although not treat diseases of the eye; in addition, he has retained the artisan-merchant characteristic and continues to fill prescriptions and market the completed spectacles. The optician (whether a dispensing optician or an optical supplier) continues as a skilled artisan and a merchant who sells both services and goods.

[10] The test is not whether the service is professional, artisan or merchant, but whether the services rendered and merchandise sold directly relate to the public health and welfare. However, historically, there has been considerable correlation between the education and experience required to qualify a person for specific tasks, and the importance such tasks carry with regard to the public good. Thus, the true or learned professions, almost without exception, have been subjected to statutory regulation for the public's protection; and, where certain crafts and businesses which have existed for a considerable length of time and operated entirely free from regulation are prohibited or severely restricted the public necessity for such legislative control must be definite and not merely fanciful.

[fol. 135] related activities cannot be regulated merely because of proximity of position. Control must cease when we pass from matters touching public welfare into matters historically mercantile and not rationally related to the public good; and, even where the public welfare is involved, the effect of the statute must bear a reasonable relation to the purpose to be accomplished[11] and must not discriminate between two similarly circumstanced groups, regulating one group but exempting the other.[12]

Clearly, that phase of visual care which deals with the actual examination of the eyes (whether for pathology or refraction)[13] together with promotional advertising which brings direct mercantile pressure upon the public to submit to examinations and to purchase spectacles, is subject to legislative control.[14] Although the evidence in the instant case indicates that no permanent injury to the eye can

---

[11] Liggett Company v. Baldridge (1928) 278 U. S. 105, 111, 49 S. Ct. 57; Lawton v. Steele (1893) 153 U. S. 133, 137, 14 S. Ct. 499.

[12] Royster Guena Company v. Virginia (1920) 253 U. S. 412, —— S. Ct. ——; Coalgate v. Harvey (1935) 296 U. S. 404, 422, 423, —— S. Ct. ——; Old Dearborn Company v. Seagram Corporation (1936) 299 U. S. 183, 197, —— S. Ct. ——. Also, see People v. Weiner (1915) 271 Ill. 74, 110 N.E. 870.

[13] "* * * In furtherance of its general purpose and to carry out the details of its plan of regulation, the Legislature could properly vest the board (of examiners) with power to make regulations reasonably adapted to assure the competency of optometrists and to prevent conduct on their part which would tend to do harm to the public. (citing cases)". Sage-Allen Co. v. Wheeler (1935) —— Conn. ——, 179 Atl. 195, 200.

[14] State of Louisiana v. Ronas (1952) —— La. ——, 67 So. 2d 99; Ritholz v. Commonwealth (1945) —— Va. ——, 35 S.E. 2d 210; Commonwealth v. Ferris (1940) —— Mass. ——, 25 N.E. 2d 378.

result from eyeglasses which concededly are misfitted,"[15] [fol. 136] the importance of accurate sight and seeing comfort (that is, a freedom from nervousness and other minor irritations which can result from ill-fitted spectacles) brings this segment of visual care squarely within the sphere of police power authority. Unquestionably, the general health and welfare could suffer as a result of promiscuous and indiscriminate fittings of eyeglasses by persons unqualified to examine the eyes, particularly where the examiners were not qualified to recognize, even if not treat, various diseases of the eye; and, in a more limited sense the health and welfare would be adversely effected if en masse the people wore improperly refracted eye glasses which impaired the overall seeing ability and comfort of the spectacle wearing public.

Although much of the Act under consideration constitutes a legitimate exercise of the legislative police power, this Court, without impliedly sanctioning all other portions of this Act, is of the opinion that this legislation in impact is unconstitutional at the following three points:

I

Those portions of section 2, which make it unlawful for any person not a licensed optometrist or ophthalmologist,

> "To fit, adjust, adapt or to in any manner apply lenses frames, prisms, or any other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the [fol. 137] frames, any lenses or other optical appliances

---

[15] As mentioned by Dr. Tullos O. Coston, eminent ophthalmologist: "Q. In that connection, Doctor, if a person has a refractive error in his eye, and doesn't obtain glasses, is his eye going to be damaged or injured in any way? A. There will be no change in the anatomical structure of the eye, there will be no damage whatever whether he wears proper glasses or does not." (Tr. 38, 39)

"I think you would have a very difficult time in demonstrating that any person is definitely damaged by being supplied with glasses that are not perfect correction of his refractive error." (Dr. Benedict, dep. p. 41.)

which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist.

The unambiguous language of section 2 makes it unlawful, among other things, for either a dispensing or laboratory optician to take old lenses and place them in new frames and then fit the completed spectacles to the *face* of the eyeglasses wearer except upon written prescription from a qualified eye examiner. Obviously, this serves to prohibit the wearers of eyeglasses from exchanging their frames either to obtain more modern designs or because the former frames are broken, without first visiting an ophthalmologist or optometrist; and, which in turn diverts from the optician a very substantial, as well as profitable, part of his business.[16]

The evidence indicates, almost without variance, that written prescriptions issued by the professional examiner contain no directive data in regard to the manner in which the spectacles are to be fitted to the face of the wearer. In addition, the Court is satisfied that the mere fitting of frames to the face, where the old lenses are available, is in reality only an incident to what fundamentally is a merchandising transaction, that is, the sale of a pair of frames; and, in any event, the knowledge necessary to perform these services is strictly artisan in character [fol. 138] and can skillfully and accurately be performed without the professional knowledge and training essential to qualify as a licensed optometrist or ophthalmologist.

Although, as emphasized previously, the legislature can regulate the artisan, the merchant, or the professional

---

[16] As demonstrated by the evidence the dispensing optician has two things to sell, lenses and frames. If prospective purchasers of frames are required to go to an ophthalmologist or optometrist to get an ophthalmic prescription, inasmuch as the optometrist fills all of his own prescriptions (and actually sells between 60-70% of the eyeglasses sold) the inevitable effect will be to deprive the optician of a sizeable amount of trade.

where the regulated services embrace issues of public health and welfare, the services under consideration bear no real or rational relation to the actual vision of the public. *Prospective* wearers of eyeglasses are not affected inasmuch as a person seeking this particular service must already possess a pair of eyeglasses; and, *present* wearers of eyeglasses are not imperiled inasmuch as such wearers have previously submitted to examinations by professional men at the time the original pairs of spectacles were obtained.

It is most important to note that the flexibility of the human eye, with particular emphasis on the service now being discussed, is such as to assure the eyeglass wearing public of good vision even where succeeding frames when fitted to the face are not always fitted in the same manner. Dr. Tullos O. Coston, in testifying in regard to the actual refraction of the eye, accented the liberality which prevails in connection with visual correction:[17]

> "* "* * * What we aim to do in a refraction, I think that sometimes we get mixed up in technical things too much. The aim of proper refraction is first of all to have the best vision that the glasses will give the patient, plus comfort. Now if the glasses are fitted improperly, and a number of times that will be true, because the patient subjectively didn't give you the proper answers, or maybe the doctor was a little careless that morning, but if he gets the glasses and he sees well, and has no discomfort, suppose that a mistake had been made somewhere, it is of no importance. You fit the patient with glasses to make [fol. 139] him see the best you can, with comfort. *Now technically whether you've got it on this axis or that axis is of absolutely no importance,* and you find people wearing the screwiest type of glasses, that when you get through examining them, your reading and your interpretation of what they need is exactly different to what they have worn, but they have been quite comfortable and they have seen well with what they have had.
>
> "Now you have two choices. You can let them wear

[17] (Tr. 71-72).

> what they have, or you can give them a new pair of glasses, and very often we let them wear what they have had, if financial matters enter into it. *You can't say that the eye is like a piston in a cylinder, you don't have to fit it to that tolerance.*" (Emphasis supplied)

If such be true in regard to the actual examination of the eyes for refraction, even more so such must be true in regard to the mere placing of original lenses in new frames and placing the frames to the face of the wearer. The legislature cannot control these specific functions, and in effect deprive opticians of their right to freely pursue a lawful calling, under the guise that such control is reasonably and rationally related to the health and welfare of the people.

The effect of section 2 which prohibits the duplication of existing lenses (that is, the preparation of a completely new set of spectacles) without a *written* prescription is also unconstitutional.

The evidence establishes beyond controversy that a skilled artisan (such as an optician) can accurately ascertain the power of a lense, or fragment thereof, without the aid of a written prescription, and can thus duplicate or reproduce the original pair of spectacles without adversely affecting the visual ability of the eyeglass wearing public. This process requires no unusual professional judgment, peculiar to the licensed professions of ophthalmology and optometry but is strictly artisan in character. The power [fol. 140] of the originally prescribed lense, or fragment thereof, can be learned by the use of a mechanical device known as the lensometer; this device (whether being operated by a professional or layman) scientifically measures the power of the existing lense and reduces it to prescriptive terms.[18]

---

[18] Significantly, the court in Palmer v. Smith (1948) 229 N.C. 612, 51 S.E. 2d 8, 11, concluded from the evidence there adduced: "It is undisputed on the record that a qualified optician can take a whole or broken lense and by use of a vertometer or lensometer, duplicate such lense with accuracy and exactness. The process of duplication is conceded to be a purely mechanical one."

Obviously, the accuracy of the lensometer operation is only commensurate to the care and skill exercised by the operator; and, logically, the vision of eyeglass wearers could be impaired somewhat by a careless commercial usage of this machine resulting in the mass production of lenses which were not accurate duplications of the original prescriptions.

Although on this precise issue of duplication, the legislature in the instant regulation was dealing with a matter of public interest, the particular means chosen are neither reasonably necessary nor reasonably related to the end sought to be achieved. As observed in the classic case of *Lawton v. Steele*:[19]

> "* * * To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that *the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.* (emphasis supplied)

It is absolutely unnecessary to delegate to professional men the control of and responsibility for the just-mentioned [fol. 141] artisan tasks, where the opticians, as a group possess adequate skill to fully protect the vision of the public in accurately duplicating existing lenses. The operation of the lensometer does not rise to the need or dignity of exclusive professional supervision. A qualified witness demonstrated and testified that any reasonably intelligent person can be taught to operate the lensometer and become qualified to accurately learn the power of existing lenses, or fragments thereof, within several hours. As further demonstrated by the evidence, the opticians, as a class, have for a number of years used the lensometer in their trade and the optometrists and ophthalmologist use this same device when wishing to check the power of lenses; and, although only a minority of licensed ophthalmologists require a patient to return to the examiner's

---

[19] Fn. 11, supra.

office to check the accuracy with which the original prescription has been filled, even in such instances the lensometer is not operated by the physician but by a clerk in the office.

The legislature has been guilty of undue oppression in failing to set up qualifying standards for the opticians, if such standards be necessary for the public protection, and at the same time arbitrarily legislating many of the skilled artisans out of a long recognized trade, by delegating the sole control of their skills and business to a professional group,[20] when the public can be completely protected with-[fol. 142] out taking from the optician this valuable property right.[21]

---

[20] The effect of section 2 is to place within the exclusive control of optometrists and ophthalmologists the power to choose just what individual opticians will be permitted to pursue their calling inasmuch as where the professional men must first give a written prescription and then "remain responsible for the full effect of the appliances so furnished by such other person" the ophthalmologists will pointedly refer their business to a limited number of channels, thus denying all other opticians the opportunity to follow their trade regardless how competently the remaining opticians are qualified. As shown by Dr. Coston's testimony: "Q. Doctor, I will ask you if under the law of Oklahoma, you are held liable for the glasses dispensed pursuant to a prescription of yours, will you issue prescriptions and permit them to be taken to any optician that patient might choose? A. No. Q. What will you do if that is the situation, assuming what I have said is the law? A. Patient will be directed to an optician I know to be reputable and reliable." (Tr. 51) Obviously, the optometrists will refer little if any business to the opticians inasmuch as they are competitors.

[21] If the function of the optician is such as to require licensing, the legislature can proceed to establish standards which must be met before an optician can be registered and forbid the practice of opticianary by non-registered opticians, just as has been provided in regard to pharmacists.

Also, on this specific point under consideration, the legislature did not act in accordance with the requirement pronounced by Mr. Justice Sutherland in *Liggett Company* [fol. 143] *v. Baldridge:*[22]

> "The act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public health; and the determination we are called upon to make is whether the act has a real and substantial relation to that end or is a clear and arbitrary

---

(See 59 Okla. St. An. 331, et seq.) The action by the legislature in the instant act is as unreasonable as if pharmacists were divested of their right to do business by legislative action which delegated to physicians the absolute control and responsibility for accurate *compounding* of medical prescriptions for the reason that a physician alone is qualified to *prescribe* drugs for patients.

Obviously, the opticians do not possess qualifications which would enable them to become licensed ophthalmologists or optometrists. As observed in Smith v. Texas (1914) 233 U.S. 630, 638: "* * * in the exercise of the police power the State may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. The liberty of contract is, of course, not unlimited, but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employe. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special and favored position. *Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.*" (emphasis supplied) Cf. People v. Brown (1950) 407 Ill. 565, 95 N. E. 2d 688.

[22] Fn. 11, supra.

> invasion of appellant's property rights guaranteed by the Constitution."

The means chosen by the legislature does not bear "a real and substantial relation" to the end sought, that is, better vision, inasmuch as although admittedly the professional eye examiners are specially trained in regard to eye examination, they possess no knowledge or skill superior a qualified practicing optician insofar as the artisan tasks in view are concerned, and in fact the two professional groups, as a class, are not as well qualified as opticians as a class to either supervise or perform the services here regulated.

In addition, and of even more significance, is the fact that section 3 exempts from regulation all sellers of ready-to-wear glasses,[23] even though such sellers, from the viewpoint of public health and welfare, lie within the identical class and circumstance occupied by "fitters and sellers of frames" and "duplicators of lenses and entire spectacles."

The rule is clear that where the police power is ushered into play it must be exercised in an undiscriminating manner in relation to all persons falling within the same class or circumstance. This principle was enunciated in *Royster Guano Company v. Virginia* wherein the Court said:[24]

> "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the States from resorting to classi- [fol. 144] fication for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. *But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.* * * *" (emphasis supplied)

---

[23] See Fn. 4, supra.

[24] Fn. 12, supra, at 415.

In the instant legislation not only is the "relation to the object of the legislation" questionable (as previously discussed) but "all persons similarly circumstanced" pointedly have not been treated alike. Persons who sell frames (incidentally adapting and fitting the completed spectacles to the face), persons who duplicate original eyeglasses and market the duplicated spectacles, and persons who sell ready-to-wear glasses are identically situated; that is, all are sellers of merchandise which is not immediately connected with or supervised by a professional eye examiner. Yet the public health and welfare is touched in the same manner and degree by each of these groups inasmuch as the possible result is exactly the same; people may wear spectacles which are not best suited for their eyes.

The legislature must not blow both hot and cold! If it be desirable for the public protection that opticians sell merchandise and service only upon written prescriptive authority, the legislature cannot at the same time permit the unsupervised sale of ready-to-wear (convex spherical lenses) eyeglasses. The mere fact the public selects at will from the counter serves as no basis for distinction; if such constitutes a distinction then the public should have the equal right to purchase new frames or duplicate prescription eyeglasses at will.

In reality, the unrestricted sale of ready-to-wear eyeglasses doubtless is more perilous than the practices pro- [fol. 145] hibited by section 2. It is certain that the customer purchasing new frames, or duplicate lenses and frames, has at some time been to a qualified eye examiner, one qualified not only to refract the eyes but qualified also to recognize diseases of the eye; whereas, the purchaser of ready-to-wear eyeglasses has not even been provided with the safeguard of an initial examination.

An example of unlawful discrimination between business groups similarly situated but wherein the legislature artificially attempted to place the businesses in two different classes is found in the case of *People v. Weiner*, wherein the court in dealing with a statute which forbade the use of secondhand material in the making of mat-resses (for sanitary reasons) but placed no such restriction in regard

to the making of pillows, held that the attempted classification was arbitrary and unreasonable and in doing so said:[25]

> "Counsel * * * argue that there is a discrimination between the manufacturers and dealers in pillows and manufacturers and dealers in mattresses, comforters, and quilts, especially after they have been used, as there is no provision made as to pillows; that, so far as this act is concerned, material made secondhand in the same way as the material in the mattresses may again be made into pillows and sold without any regulation whatever. Under the decisions of this state this is class legislation. (citing authorities) The provisions of sections 1 and 2 of the act are arbitrary and unreasonable, and must be held unconstitutional and void."

Inasmuch as there is no real difference between ready-to-wear spectacles and prescription eyeglasses, insofar as the public's need for properly fitted eyeglasses is concerned, to regulate prescription eyeglasses, as done in sec- [fol. 146] tion 2, and yet expressly exempt ready-to-wear eyeglasses constitutes an unreasonable and discriminatory classification in contravention to the equal protection clause of the Fourteenth Amendment.

II

That portion of section 3 which makes it unlawful "to solicit the sale of * * * frames, mountings * * * or any other optical appliances."

As mentioned previously, the legislature has the authority to regulate and control "bait advertising", that is, advertising which not only tends to persuade the public to submit to eye examinations but also tends to result in the purchase of completed pairs of spectacles.[26] Clearly, it is

---

[25] Fn. 12, supra, at 873, 874.

[26] Fn. 14, supra. In approving that line of authority which holds that the legislature has power to regulate ad-

[fol. 147] against the best interest of the public to have the number of eyeglasses worn determined by mercantile practices rather than the actual visual need of the people. Where advertising, which when uncontrolled, encourages such a condition the right of the legislature to supervise

---

vertising by retail dealers of eyeglasses, the Court in the very recent case of State of Louisiana v. Rones, fn. 14, supra, at 105, commented: "* * * These courts have decided that the statutes are a reasonable exercise of the *policy* power because they prevent 'bait advertising' which attracts the unwary to purchase inferior glasses; eliminate the temptation to, and the pressure upon, customers that result from the assurance that no more than a named price will be charged; protect an uncautious and unwary public from being misled and deceived; prevent the increase in sales and the incidental harm that come from unfitted eyeglasses; eliminate to some extent poor quality and poor workmanship which naturally result from the desire to sell spectacles in quantity at a low advertised price for the purpose of underselling competitors."

Advertising which tends to mislead the public into thinking the advertiser is qualified to practice professionally is likewise subject to regulation. See Curtis v. Registered Dentists of Oklahoma (1943) 193 Okla. 233, 143 P. 2d 427 wherein at 429, the Court said: "* * * we are of the opinion that it is apparent that it was the intention of the Legislature to protect the public from any person who might undertake to engage in the practice of dentistry without license to do so, and that part of its purpose was to prevent anyone other than licensed dentists supplying artificial substitutes for natural teeth to the persons who would use them. An examination of the stipulation of facts discloses that defendant, who had no license to practice dentistry, was engaged in the business of supplying substitutes for natural teeth to the public at large through advertisements in the newspapers and the telephone directory which patently were designed to induce the public to believe that the defendant was authorized to engage in the practice of dentistry by supplying artificial substitutes for natural teeth."

this segment of the field of visual care is identical with the legislature's right to supervise the fields of medicine and dentistry.[27]

Thus, any statute which regulates advertising in regard to eye examinations (that is, for eye diseases and for refraction, by one qualified to recognize, if not treat, diseases of the eye) or other advertising which promotes the sale of complete eyeglasses (particularly the original pair)[28] upon mere merchandising principles rather than in regard to [fol. 148] the actual visual need, can be deemed rationally related to the public health and welfare. However, where

---

[27] As mentioned in Semler v. Oregon State Board of Dental Examiners (1935) 294 U.S. 608, 612, 55 S. Ct. 570: "The state court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods 'to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them'. The Legislature was aiming at '* * *' bait advertising. 'Inducing patronage,' said the court, 'by representations of "painless dentistry," "professional superiority," "free examinations," and "guaranteed dental work" was, as a general rule, the practice of the charlatan and the quack to entice the public. * * *'"

[28] This parenthetical observation is made because the Court believes that the primary basis of the legislative authority is the fact that the public should not be induced to become eyeglass wearers under the same conditions they are induced to purchase ordinary mercantile commodities. Once a person has been properly examined and has become a spectacle wearer, advertising in regard to even a completed set of eyeglasses presents very little evil as to him although it may still be of public interest to control advertising, with accompanying competitive practices, which may result in the production of inferior optical merchandise and service.

a statute, such as the provision under consideration, intrudes into a mercantile field only casually related to the visual care of the public and restricts an activity which in no way can detrimentally effect the people, such an intrusion is unconstitutional."

"The effect of the instant statute, which even prohibits the display of frames in a show window, must be sharply distinguished from Commonwealth v. Kresge Co. (1929) —— Mas. ——, 166 N.E. 558, 560, 561, wherein the court said: "It seems to us that the statute here in question conforms to every requirement for validity thus laid down and is not obnoxious to any one of them. The defendant is undertaking to invade under the guise of private mercantile business a field rightly sequestered, by the Legislature in the interests of the public health (that is, the fitting to the eyes and sale of completed ready-to-wear spectacles) to those possessing special skill and training in a specified department of treatment of human ills."

In addition, although the field of visual care has been the object of *regulation* in regard to advertising (see fn. 14, supra) this Court knows of no instance where a legislature has utterly *prohibited* all forms of advertising, except the Louisiana Legislature. (See L.S.A.-R.S. 37:1041 et seq.) Significantly, the Louisiana Supreme Court in the Sones case, fn. 14, supra, at 106, although ruling that § 1063(9) of the Louisiana Act which prohibited any retailer from advertising optometric services or spectacles "as free or for a price," was constitutional, the Court by way of dictum remarked that as to § 1065 (the section completely prohibiting advertising of any form) "a plea of unconstitutionality might have merit." Distinguish the instant legislation from the issue in City of Springfield v. Burst (1944) —— Ohio ——, 56 N.E. 2d 185, 186 wherein a city ordinance was held constitutional which forbade "advertisement by newspaper, radio, display, or otherwise, *any statement advertising the price of lenses, or of complete eyeglasses*, including lenses, either with or without professional services or credit terms, installment payments or price plans, or the price of any frames or mountings,

[fol. 149] Naturally, where a commodity being sold is so closely associated with the administration of medical treatment to a patient that the commodity itself becomes a mere incident to and actually a part of the medical treatment being rendered, becoming part and parcel of the professional judgment being exercised on behalf of the patient, then the commodity is subject to complete control and regulation; as observed by Mr. Chief Justice Hughes in *Semler v. Oregon State Board of Dental Examiners*[20] such a condition exists in dentistry:

> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the market place."

However, this Court discerns utterly no analogy between the danger inherent in uncontrolled dental advertising, and advertising by dispensing opticians, or others, of various styles of frames, mountings and other modern and improved optical appliances, where such advertising omits the promotion and display of lenses or complete eyeglasses and makes no reference to eye examinations. Publicity limited strictly to frames can be deemed nothing more than straight merchandising inasmuch as it has no real relation to the vision of the public and should only be subject to those limitations recognized generally in regard to ethical mercantile advertising.

Inasmuch as a large majority of the eyeglass wearing public have more than one set of eyeglasses they are, from

---

unless in conjunction therewith the words, 'without lenses' appear in such manner to be clearly discernible, or read in such manner as to be clearly understood." (emphasis supplied); and, likewise distinguish Klein v. Department of Registration and Education (1952) —— Ill. ——, 105 N.E. 2d 758 which had to do with the restricting of certain kinds of advertising by optometrists.

[20] Fn. 27, supra, at 612.

[fol. 150] time to time in the market for new frames, not only to replace broken ones but to acquire those more modern in appearance as the frame has become an integral part of the present-day cosmetology. Advertising directed exclusively at this feature of eye wear can have no deleterious effect on the public, inasmuch as it has no influence on the *prospective* wearer of eyeglasses, and to the *present* wearer (a person already examined by a licensed professional) is but a mere piece of merchandise.

The dispensing optician, a merchant in this particular, cannot arbitrarily be divested of a substantial portion of his business upon the pretext that such a deprivation is rationally related to the public health.

III

That portion of section 4 which provides that: "No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store".

Unquestionably the legislature has the authority to prohibit corporations from practicing Ophthalmology and Optometry in Oklahoma; and, insofar as section 4 moves inferentially toward such a goal, the legislature has acted within its authority.[31] As stated in *Sears Roebuck & Company, et al. v. State Board of Optometry*,[32]

> "In the clear and comprehensive opinion the chancellor examined the statutes, and said in part as [fol. 151] follows: 'The weight' of modern authority is against such arrangements as we have here (i.e. corporate practice in the field of optometry), and the question presented is whether the optometrist is working for the defendant companies as an employee, or for himself as a licensed and independent practitioner.
>
> "'*It is only in the latter capacity that his status could be legal and his license authoritative in profes-*

[31] See fn. 5, Supra.

[32] ——— Miss. ———, 57 So. 2d 726, 730 (1952)

sional relation and service to the public.' " (Emphasis supplied)

And as recognized in *Neill et al. v. Gimbel Bros., Inc.*:[33]

"* * * We cannot pronounce arbitrary or irrational the placing of optometry on a professional basis. This conclusion finds support in other jurisdictions. (citing cases)

* * *

"* * * The legislature has the right to forbid such practice as contrary to public policy, which is properly concerned with the maintenance of high professional standards. *One who practices a profession is apt to have less regard for professional ethics and to be less amenable to regulations for their enforcement when he has no contractual obligations to the client, does not fix or receive the fees, and is under the control of an employer whose commercial interest is in the volume of sales of merchandise effected by the prescriptions of the employee-practitioner.*" (Emphasis supplied)

However, to forbid the renting or sub-leasing of quarters from retail merchants in order to enforce the legislative prohibition against corporate practice constitutes an arbitrary interference with the right of contract.

Concededly, as some of the cases illustrate, corporate practice has taken place where corporations sub-lease space to professional eye examiners. However, the correlation between the evil sought to be prevented and the one circumstance singled out and prohibited is not sufficient to authorize such a police power regulation. As mentioned [fol. 152] in *Treigle v. Acme Homestead Association*:[34]

"* * * Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the

[33] 330 Pa. 213, 199 Atl. 178, 182 (1938).

[34] 297 U.S. 189, 197 —— S. Ct. —— (1936).

> power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

And as observed in *Indiana ex rel. Anderson v. Brand*:[55]

> "Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power but we have repeatedly said that, in order to have this effect, the exercise of the power must be for an end which is in fact public and the means adopted must be reasonably adapted to that end * * *"

We believe the means chosen in this particular instance is "arbitrary and oppressive" and not reasonably adapted to the accomplishment of the end sought, that is, the abolition of corporate practice in the professions of ophthalmology and optometry. As evidenced in the *Sears Roebuck & Company case*, supra, even though a leasing arrangement can be used to attempt to evade a corporate practice prohibition, nonetheless, the fact of statutory violation can be established by competent proof of the kind and character used to prove any other statutory breach.

Whether a professional man indulges in corporate practice, in violation of a statutory prohibition, is a matter of his individual integrity rather than his geographic location.

The instant prohibition is just as unreasonable as if the legislature, in order to aid in the enforcement of certain [fol. 153] criminal statutes, banned the use of automobiles by the general public because law violators use automobiles in their illicit operations.

Conclusion

It is the opinion of this Court that the plaintiffs are entitled to a permanent injunction restraining and enjoining the defendants Mac Q. Williamson, Granville Scanland, Robert L. Wheeler, and all remaining County Attorneys

[55] 303 U.S. 95, 108, —— S. Ct. —— (1938).

in the State of Oklahoma from enforcing or attempting to enforce against the plaintiffs[46] the provisions of sections 2, 3 and 4 which have been designated as unconstitutional in this written opinion.[47]

---

[46] The Court recognizes that the legislature has the authority to prevent "bait-advertising" and other evils associated therewith in the nature of corporate practice; and, that the instant plaintiffs at this time may be engaged in practices which rightly can be prohibited by the legislature in a valid enactment; however, the legislature cannot, as here attempted, kill the patient in order to eliminate the disease.

[47] The Attorney General has not urged that the plaintiffs are not entitled to equitable relief even though certain provisions of the instant Act have an unconstitutional impact upon the plaintiffs. However, this Court is not unmindful of the cardinal principle that Federal courts of equity should not interfere with the processes of the criminal law in State courts or determine questions of criminal liability under these laws, unless in most exceptional circumstances in order to prevent irreparable loss. Beal v. Missouri Pac. R. Co. (1940) 312 U.S. 45, 50; and "* * * the imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out are among the vital allegations which must be shown to exist before restraint of criminal proceedings is justified." Watson, et al. v. Buck, et al. (1941) 313 U.S. 387, 400. Cf. Spielman Motor Co. v. Dodge (1935) 295 U.S. 89, 95.

[fol. 154] The plaintiffs' allegations, together with the undisputed proof, indicate that immediate and unrelenting enforcement of all the provisions of this Act, provisions clear in meaning and intent, by the defendant State officers, is imminent; in fact, defendants' counterclaim in this suit specifically demands injunctive relief against the plaintiffs as authorized by section 6 of the instant Act. The inevitable result of the enforcement of the provisions found by this Court unconstitutional in points I and II of the Opinion, as applied to the two dispensing optician plaintiffs, will be

Counsel should submit a journal entry to conform with this opinion within 15 days.

[fol. 155] Murrah, Circuit Judge, dissenting in part:

With reluctance and some misgivings, I concur in that part of the judgment of the court declaring unconstitutional the legislative prohibitions against fitting, adjusting, adapting or applying lenses, frames, prisms or other optical appliances to the face of a person, or duplicating or re-

---

to literally put said plaintiffs out of business; unquestionably, from such an injury there can be no adequate remedy at law and that such will result is not conjectural but positive. The effect of the enforcement of the Act on the unconstitutional feature discussed in point III of the opinion, as applied to plaintiff, Dr. Rips, although not resulting in putting Dr. Rips clear out of business, will be to compel said plaintiff to relinquish a very desirable and valuable lease and to move to another place of business. Insofar as all plaintiffs are concerned no adequate remedy is available; the State cannot be held responsible for the business loss of the two dispensing optician plaintiffs or the loss of a lease by plaintiff Rips, valued at more than $5000; and, certainly a lessor cannot be held responsible for cancelling a lease in conformity with a state criminal law requirement (notice of cancellation of which has already been given).

It is contrary to the spirit of reason as well as equity to direct these plaintiffs to choose between complying with all provisions of the instant Act, thus submitting to irreparable and irrecoverable business losses while the constitutionality of the provisions of the statute are tested; or, to continue in business thus violating the clear language of the criminal law countless numbers of times each day in the hope that eventually such prosecutions will prove unsuccessful because of the unconstitutional nature of the criminal statute. Significantly, section 6 of the instant Act provides: "Any person, firm * * * violating any of the provisions of this Act shall be guilty of a misdemeanor and

placing the same without prescriptive authority of a licensed ophthalmologist or optometrist.

The obvious result of this legislation is to appropriate a property right of one class to follow a legitimate calling or occupation and to give it to another class not shown to be more competent in the public interest. Indeed, the evidence shows that it would be inimical to the public interest to require the wearer of eye glasses to return to the ophthalmologist in order to obtain a prescription for the replacement or duplication of an eye glass, or to place the burden upon the ophthalmologist of merchandising frames and mountings and other appliances, or placing that purely

---

upon conviction thereof shall be punished for each such offense, as provided by law * * *"; and, 21 Okla. Stat. Anno. § 10 states that "* * * every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding one year or by a fine not exceeding five hundred dollars, or both such fine and imprisonment. * * *" What facts could more pointedly justify the exercise of equitable authority than these,—where the plaintiffs are faced with both an injunctive prohibition and a liability for multiple criminal prosecutions. See Toomer v. Witsell (1947) 334 U.S. 385, 391. Also, see Parker v. Brown (1942) 317 U.S. 341, 349; Family Sec. Life Ins. Co. v. Daniel (D.C.S.C. 1948) 79 F. Supp. 62, reversed on other grounds 336 U.S. 220. As observed by the three judge court in Russo v. Reed (D.C. Mo. 1950) 93 F. Supp. 554, 558, in a case directly in point: "Equitable jurisdiction in the premises on the ground of a threatened irreparable injury is clear and imminent is obvious, for the loss of a season's fishing can not be restored, and the State of Maine provides no means for recovering damages in money to compensate for the loss occasioned by an illegal deprivation of the right to fish commercially within its coastal waters. (citing case) Nor do we see any occasion here for application of the doctrine of American Federation of Labor v. Watson, 327 U. S. 583 * * * for the Maine statutory provisions involved are clear and need no interpretation, and so far as we are aware no other special circumstance exists requiring the federal courts to stay action pending proceedings in the courts of the State."

commercial monopoly in the optometrist. There is no rational basis for depriving the optician of the right to [fol. 156] perform this purely mechanical and commercial service to the public.

I cannot agree, however, that the legislature of the state may not constitutionally prohibit any person, firm, company, corporation or partnership from soliciting the sale of frames, mountings, prisms, or any other instrument deemed essential and used in the field of visual care by enumerated methods of advertising when it does so for the declared purpose of vouchsafing the "best possible visual care" to the public.

The effect of the order of the court is to make it unlawful to advertise the sale of spectacles, eye glasses or lenses but to allow any person, firm, company, corporation or partnership to solicit the sale of the empty frames, mountings, prisms and other appliances or devices. By this method one so engaged may circumvent the very evil to which the legislation is aimed, namely, prohibiting dishonest and dangerous practices in the sale of optical goods and devices.

There can be no doubt of the power of the legislature to regulate advertising practices of retail dealers of eye glasses. See State v. Rones, 67 So. 2d 99, and cases cited at Page 105. There may be good reasons for requiring [fol. 157] the prohibition of advertising the sale of merchandise, the actual sale of which is not prohibited. Commonwealth v. Ferris, 25 N. E. 2d 378. It is true that all of the statutes which have been upheld as a valid regulation or restriction on the advertising of the sale of eye glasses have been judicially construed to apply to the furnishings of optometrical services or actual visual care, and not the mere sale of frames, mountings or fittings as merchandise. But I entertain no doubt of the power of the legislature to regulate the advertising of the empty frames, mountings and prisms and other optical devices if the object of such legislation is the prevention of fraud or mistake or to protect the public against deceptive practices in the broad field of visual care. The power of the state to regulate or restrict advertising of a commercial business affected with a public interest has been upheld in a great variety of cases, including the sale of eye glasses. See Commonwealth v.

Ferris, supra, at page 380; Commonwealth v. Nutting, 55 N.E. 895, affirmed 183 U.S. 553; Ritholz v. Commonwealth, 35 S.E. 2d 219.

Considered in isolation, an eye glass frame or mounting is no more than a mere piece of merchandise. But considered in the context of the total field of visual care, [fol. 158] it takes on a significant relationship to the visual needs of the public and ceases to be a mere piece of merchandise to be dealt with in the market place on an arms length basis. As the dispenser of the completed eye glass the optician is a trained technician—the "right arm" of the ophthalmologist. As such he may be held to a standard more strict than the morals of the market place. Certainly the well-defined and legitimate functions he performs, both as a trained technician and a merchandiser, in the field of visual care are affected with a public interest, and the public may not be left to deal with him at arms length. And it is the same with the merchant optometrist. Certainly in the eyes of the public the optometrist is not seen in his dual capacity of a merchandiser as to whom he is required to deal at arms length and a professional in whom he can place his trust and confidence.

The challenged act is a legislative scheme to effect one declared public policy and each of its parts ought to be considered in *pari materia* in determining whether or not the legislature has acted beyond the scope of its broad and comprehensive police powers. Section 4 is pertinent, therefore, to the inquiry whether a valid constitutional basis can be found for prohibiting the advertisement of the merchandise not of itself related to visual care. Section 4 pro- [fol. 159] hibits rebates, kick-backs, and solicitation by those selling optical goods, appliances or materials. And it forbids corporate practice. All of these we leave as proper subjects of police power. But the judgment of the court strikes down that part of the section which prohibits any retail establishment from renting space in its establishment to any person doing eye examinations or visual care. This prohibition in the statute is said not to bear any reasonable relationship to the admitted power of pre-

venting corporate practice, or for that matter any other practice deemed not in the public interest.

I agree that on its face it seems unreasonable and irrational to deny to the professional man quarters in a retail establishment. But to me the undisputed facts in this case point up the very evil to which the legislation is aimed.

Ellis Carp is the owner or is interested in eighteen optical establishments in Texas. All of them are dispensing opticians. He is also interested in a supply house in Dallas where lenses are ground on orders from the dispensing opticians. In Texas, Mr. Carp employs persons on salary to refract the eyes of those who are induced to come to his optical establishments. By this method the dispensing optician solicits the business, refers the customers to the [fol. 160] salaried employee who does the refracting and prescribes for the visual correction. The prescription is returned to the optician for filing, fitting and adjusting. So, the optical company operating under a trade name actually performs the optical services constituting the very corporate practice which Oklahoma legislation condemns and prohibits.

In Oklahoma, Mr. Carp owns and operates the Douglas Optical Company in Tulsa in space rented from the Zale Jewelry Company. The Douglas Optical Company is a dispensing optical company which advertises by all of the media condemned in the challenged legislation. Soon after the Douglas Optical Company commenced business, Dr. Rips, a licensed ophthalmologist, and formerly in the employ of Carp in Dallas, came to Tulsa; conveniently rented space in the Zale Jewelry Company and set himself up in practice. Admittedly all of the members of the public seeking visual care, who are induced to come to Douglas by its advertisements, are referred to Dr. Rips, and while no one is compelled to take Dr. Rip's prescription to Douglas, "most of them go there because they generally come from there."

Mr. Carp is also the president of a corporation known as the Lee Optical Company with ground floor offices in the [fol. 161] American National Building in Oklahoma City. It employs advertising media condemned and prohibited in the legislation. Soon after the Lee Optical Company

opened for business in Oklahoma City, Dr. Conti formerly employed by Carp in Texas to refract eyes, came to Oklahoma City and established himself in offices on the third floor of the American National Building. All of the members of the public who are induced to come to the Lee Optical Company for visual care are referred to Dr. Conti whose prescriptions usually find their way back to Lee Optical Company for filling.

While neither Conti nor Rips is employed by Lee Optical Company or Douglas Optical Company, and neither of them rebates for the referrals, the reciprocal arrangements enable them to completely commercialize the whole field of visual care, which we agree is affected with a public interest and subject to legislative control.

Under the order of the court, Douglas may continue to occupy space in Zale's Jewelry Company in Tulsa. Dr. Rips may continue to occupy space under the same roof. The Douglas Optical Company may continue to advertise frames and mountings and other optical devices by radio, television, classified ads, and by any other commercial [fol. 162] means. It will continue to attract the unsuspecting public, who not knowing the difference between an optician, ophthalmologist, or optometrist, will undoubtedly find their way to Dr. Rips, who having prescribed will see that they are returned to Douglas in order to complete the cycle.

The loophole which this judgment leaves in the legislative scheme is wide and in my judgment glaring. It is an unwarranted interference with the police power of the state over a subject with which the state is fully competent to deal. To borrow the language of Mr. Justice Holmes: "We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it is often difficult to mark the line where what is called the police power of the states is

limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power." Noble State Bank v. Haskell, 219 U.S. 104, 110.

[Vol. 163] In cases of this kind we ought to keep in mind the extremely limited restrictions that the due process clause of the Fourteenth Amendment places upon the states; and that federal courts should negatively inject themselves into the policy making powers of the states only in the presence of a palpable abuse of the due process clause of the constitution.

Sections 3 and 4 have uniform application and incidence to all affected thereby. There is no question of equal protection of laws involved. Only the question of due process under the Fourteenth Amendment is involved, and the basis of our jurisdiction is injunctive relief against the enforcement of a state statute with criminal sanctions. Before we rush in to strike down a part of the act, we ought to consider that due process in the state court is afforded to any person who would challenge any provision of the act by exposing himself to the criminal penalties involved. There is no more firmly established or salutary rule than the admonition against striking down the criminal laws of a state by federal injunctive process. Federal injunctive interference with the criminal laws of a state is justified only in exceptional circumstances and with a showing of great and immediate irreparable damage. Otherwise the [fols. 164-168] accused should first set up a defense in the state court where his constitutional rights may be amply protected. See Watson v. Buck, 313 U. S. 387, 400. Reed v. Lehman, 91 F. 2d 919; Starnes v. City of Milledgeville, 56 F.Supp. 956.

I would certainly stay the federal hand in respect to the enforcement of Sections 3 and 4 of the Act. As to Section 2, while I have some misgivings about injunctive relief, I am clear on the issue of constitutionality.

[fols. 169-178] Statement Required by Paragraph 2 of Rule 12 of the Rules of the Supreme Court of the United States (omitted in printing)

[fol. 179] In the United States District Court

[Title omitted]

Order Allowing the Appeal—filed May 25, 1954

Plaintiffs Lee Optical Company, Inc., a corporation, and Ellis Carp, d/b/a Douglas Optical, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court entered in this cause on March 29th, 1954, and having also made and filed their Assignment of Errors and Prayer for Reversal, and Statement of Jurisdiction of the Supreme Court of the United States, and having in all respects conformed to the statutes and rules in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $500 with good and sufficient surety, said bond to be conditioned as may be required by law.

It is further ordered that citation be issued in accordance [fol. 180] with law.

Dated May 25th, 1954.

Edgar S. Vaught, District Judge; ——— ———, Circuit Judge; W. R. Wallace, District Judge.

[fol. 181] [File endorsement omitted.]

[fols. 182-184] Bond on Appeal for $500.00 approved and filed May 25, 1954 omitted in printing.

[fols. 185-187] Citation in usual form showing service omitted in printing.

[fols. 188-190] Certificate of Service and Notice of Appeal (omitted in printing).

this effect, first, the evidence will show that approximately 70% of the eyeglasses in this country are dispensed by optometrists, and that optometrists will not issue prescriptions except in rare instances. They do their own dispensing, whereas the ophthalmologist, on the other hand, by and large does not do his own dispensing, but permits the patient to take the prescription for the eyeglasses he prescribes to an optician, who will then fill them and perhaps have the patient go back to the ophthalmologist for checking.

Now we will show that the effect of all of those things under Section 2 is to take away from the optician part of the functions that he has historically performed, when there is no basis in the interest of public health or welfare to support such a deprivation.

Judge Vaught: What are the particular rights that are taken away from the optician?

Mr. Woods: If your Honor please——

[fol. 205] Judge Vaught: State them briefly.

Mr. Woods: They take away from him the right to fit, adapt or adjust or in any manner apply eyeglasses to the face of a person, except under a written prescription from a licensed practitioner in Oklahoma.

Now that has two effects. First, inasmuch as 70% of the eyeglasses are dispensed by opticians who don't permit their prescriptions to go out to opticians, he is losing 70% of the business there, because when——

Judge Vaught: (Interposing) You mean optometrists instead of—you said opticians when you meant optometrists.

Mr. Woods: Thank you, your Honor. Secondly, the evidence will show that a prescription for fitting, adjusting and adapting to the face is something that is either impossible or highly impracticable to place in writing. You have got to have the patient or the customer before you so you can fit and adjust the glasses to the face.

The second thing prohibits him from duplicating broken lenses, except upon the same conditions I have heretofore announced, with the same effect, as we view it; and thirdly, from placing or replacing the frames, lenses——

Judge Vaught: That is the optometrist you are talking about?

Mr. Woods: The optician.

Judge Vaught: Now then, the optometrist, what does [fol. 206] he do, just briefly?

Mr. Woods: Briefly, the optometrist refracts eyes to determine what the refractive error, that is the visual error, if you will, in the eye is, and he prescribes lenses to correct that error.

Judge Vaught: He performs the same function as a physician?

Mr. Woods: As far as refraction is concerned, he performs the same function as a physician; by that I mean an M.D., a medical doctor.

Judge Vaught: Then in addition to that, does he make the glasses?

Mr. Woods: Ordinarily—he operates in several ways. He may either actually make the glasses himself, or he may have them made by an optical supplier and then in turn receive them back from that supplier and dispense them to the patient, or he may get just the lenses and cut them and edge them and mount them in frames and dispense them to his patient. He can operate in any variation of those three general categories, either completely in the field where he fabricates the glasses himself, or to the other extreme where he gets the completed glasses from the optical supplier and then dispenses them to his patient.

The optometrist, of course, by law, cannot treat eyes for any pathological condition. He is limited to his meas- [fol. 207] urement of the refractive error by law.

Judge Vaught: What do you call an ophthalmologist?

Mr. Woods: An ophthalmologist, if your Honors please, is a medical doctor licensed by this state, who devotes, as I recall, more than fifty percent of his time to eye care, the treatment of diseases of the eye, or refraction, surgery—eye surgery. Oculist is a term sometimes used, and the oculist and the ophthalmologist are really synonymous, but the ophthalmologist is the term generally used to designate a medical doctor who is a specialist in the field of visual care, eye surgery, diseases of the eye, and refraction.

Judge Murrah: Is that all?

Mr. Woods: I also failed to mention one other aspect of this law, if the Court please, and that is as it is written, it prohibits the filling of prescriptions by, for example, an

[fols. 191-194] Motion and Order to Have Original Records in the District Court Transmitted to the Supreme Court as a Part of the Record Upon Appeal (omitted in printing).

[fol. 195] [File endorsement omitted.]

[fol. 196] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

Reporter's transcript of Proceedings — Filed February 12, 1954

In the United States Court House and Post Office Building, Oklahoma City, Oklahoma

APPEARANCES:

For the Plaintiffs: Dick H. Woods and John Phillips, (of) Stinson, Mag, Thomson, McEvers & Fizzell, First National Bank Building, Kansas City 6, Missouri; Duke Duvall (of) Dudley, Duvall & Dudley, Liberty National Bank Building, Oklahoma City, Oklahoma.

[fols. 197-198] For the Defendants: Fred Hansen, Assistant Attorney General, State of Oklahoma, Oklahoma City, Oklahoma; James E. Harkin, Assistant Attorney General, State of Oklahoma, Oklahoma City, Oklahoma; Fred Daugherty, First National Bank Building, Oklahoma City, Oklahoma; LeRoy Powers, Office of the Governor, State of Oklahoma, Oklahoma City, Oklahoma; Paul Harkey, Idabel, Oklahoma.

[fol. 199] PROCEEDINGS — October 26, 1953

Judge Murrah: Are the parties ready in Number 6002?

Mr. Woods: Plaintiff is ready, your Honor.

Mr. Daugherty: The defendant is ready, your Honor.

Judge Murrah: Any amendments to the pleadings, last minute amendments to the pleadings, any statement in that respect; the answer has been filed, the pleadings are all closed?

Mr. Hansen: If the Court please, by direction of the Governor, Mr. LeRoy Powers would like to have his appearance entered as an attorney for the defendant in this case. We have the direction of the Governor here.

Judge Murrah: Nice to have you. Do you wish to make a short statement?

Mr. Woods: If your Honors please, I would like to make a brief opening statement.

Judge Murrah: Well, the Court has no disposition to limit you, but we heard you at length the other day; but you may do so.

Mr. Woods: If your Honors please, I would like to summarize some of these issues, because I realize that we went into many of them during the pretrial conference.

[fol. 200] Judge Murrah: Proceed.

Opening Statement by Mr. Woods

Mr. Woods: May it please the Court, in view of, as I said a moment ago, the discussions and the proceedings had last Thursday in the pretrial conference, my opening statement shall be brief and solely for the purpose of pointing out the highlights of the issues as we see them and referring very briefly to an outline of the evidence we hope to present.

Now as the Court knows, this is an action for a declaratory judgment in which the plaintiffs seek a declaration that House Bill Number 953, enacted by the last session of the Oklahoma Legislature, is unconstitutional.

The plaintiffs are two dispensing opticians operating in this state, namely Mr. Carp, who operates as an individual, and Lee Optical Company, an Oklahoma corporation, with its place of business here in Oklahoma City; the third plaintiff is Dr. Oran Rips, a licensed M.D. in the State of Oklahoma, who rents office space from the Zale's Jewelry Company in Tulsa, Oklahoma, in their place of business.

The salient sections of House Bill 953 that are involved in this action are first, Section Number 2, which in summary prohibits any person other than a physician or an optometrist licensed under the law of Oklahoma from fitting, adjusting, or in any manner adapting eyeglasses, frames, lenses, prisms, or any other device intended to aid the human [fol. 201] vision, to the face of any person, except upon a

prescription issued by such licensed practitioner to an optical supplier, in which case the optical supplier, the physician authorizing him by this prescription, may perform those acts.

The section also prohibits the duplication of eyeglasses; by that I mean the duplication of the lens, in the case where a lens is broken. It also prohibits the placing of lenses or the replacing of lenses into frames. Both of those, duplication and replacement, are all prohibited unless covered by a prescription from an Oklahoma licensed practitioner.

Section 3 is the next portion of the statute being involved in this proceeding. That prohibits, I think I can say very generally, all types of advertising by an optician, also of course by ophthalmologists and by optometrists. The exception there to the solicitation for the sale of optical goods is made for the so-called dime store glasses, the glasses with just plain convex spherical lenses.

The third section of the statute in issue here is the provision that prohibits the leasing of any space in a retail type of establishment to a person doing or purporting to give visual care.

If the Court please, our evidence in this proceeding will establish that in the field of visual care there are three main groups: The ophthalmologist, who is the M.D., [fol. 202] and who can both refract and treat diseases of the eye; the optometrist, who under law can only refract; he cannot treat any pathological condition of the eye; and thirdly, and the oldest of those three, the optician.

Our evidence will establish that the optician's history goes way back to medieval times, and from then on forward until sometime early in the 19th century, he was the only man in the field of eyeglasses, making spectacles. Early in the 19th century the ophthalmologist developed as a specialist. About the end of the 19th century, along about 1895, the opticians had a separation movement started in which the so-called refracting opticians, if you will, or optometrists of today, pulled off and separated from the dispensing opticians.

Our evidence will show that in the separation movement of the refracting optician, the optometrist retained a dual capacity, that of refracting eyes which under the law in-

volves professional skill, and secondly, that of selling eyeglasses.

Now the opticians' functions historically and today have remained essentially the same. He is the person charged with grinding, either in whole or in part, the lens blanks that are inserted in eyeglasses, then in cutting and edging, piercing them if necessary to mount them in the frames for eyeglasses. His next important function is taking those [fol. 203] eyeglasses as mounted in the frame and fitting, adjusting, and adapting them to the face of each patient.

Our evidence will also show that the optician traditionally duplicated broken lenses, by measuring the power of that lens by accurate instruments; and fourthly he from time to time either replaces lenses entirely in existing frames, or he may make extra duplicate pairs of eyeglasses.

Those are the functions of the optician as our evidence will establish.

Now the evidence that we intend to introduce to this Court will establish, we believe, that the effect of the prohibitions of Section 953 is to, in a large part, take away from opticians this business that they have traditionally performed, these functions, these acts that are part of their long historical background, and our evidence will establish to you that there is no requirement, no necessity in the interests of public health and welfare for those functions to be removed from the optician.

The evidence that we will introduce, we believe, will establish also that those functions that this law takes away from the optician are being transferred over to the optometrists, a man whom, as I pointed out a few moments ago, occupies a dual position, that of a professional man by virtue of legislation, and secondly that of a merchandiser of eyeglasses; and our evidence will show that a major portion [fol. 204] of his earnings, his income, his livelihood, comes from the sale of those tangible articles of standard merchandise.

If the Court please, our attack upon these sections of the statute is upon these fundamental grounds, first: That Section 2, in prohibiting the optician from fitting or adjusting or adapting glasses to the face, except upon the written authorization by prescription of a licensed practitioner, has

ophthalmologist in Texas or Arkansas or some place by opticians in this state. The requirement of the law is that the prescription must be written by a practitioner licensed by the State of Oklahoma.

Those, your Honors, are the salient features of our case.

Judge Murrah: Mr. Counsel, you have made a very clear and succinct statement of your case. Would it be burdensome for you to have that transcribed for the use of [fol. 208] the Court?

Mr. Woods: Be very happy to do that, your Honor.

Judge Murrah: I don't think it is long and it will not be expensive, would it?

Mr. Woods: Not at all, be very happy to do that.

Judge Murrah: Appreciate it if you do that; the Court will appreciate it.

Do you wish to make an opening statement? If you wish—it's at your pleasure.

Opening Statement of Mr. Daugherty

Mr. Daugherty: Yes, sir, thank you.

May it please the Court, it is the contention of the defendants that the Legislature, in its wisdom, at its last session has seen fit to enact into law a new bill, the type of which is a bill governing and regulating the sale of optical goods.

I pointed this out to members of the Court other than Judge Vaught the other day, but since this is important, I would like to repeat that Oklahoma since 1911 has had an optometry law. Since about that time it has also had a medical law. However, Oklahoma has never had until this last session a law covering the sale of optical goods, and I think it's important for us to keep in mind at all times that this is not an optometry law, it is not a medical law, but it is a new bill covering the sale of optical goods.

Judge Murrah: Proceed.

[fol. 209] Mr. Daugherty: The Legislature has seen fit, by reason of evidence presented to it, to enact a law governing something actually that it hasn't seen fit to enact regulations on before. I think the Court probably knows something about the injunction suit entered in Illinois in 1950 against the major optical supply companies, wherein

the doctors were enjoined from receiving rebates, and in that injunction may it please the Court, these major optical suppliers were enjoined from dispensing for ten years.

As a result of that action, a number of these so-called dispensing opticians, most of whom had perhaps been employed by these major companies, others sprung from various other sources, only in the past few years; and they have opened these stores and they have started contacting the public, and they have entered into the field of visual care.

Now we agree that the optician's is an ancient art, but the conditions existing in this state and through the entire United States as a result of this injunction, are of recent origin, and our Legislature has just seen fit to bring this regulation into the law of this state.

Now Section 1 and Section 2 of the law I think might be discussed together. The law itself speaks very well. I think it is clear, and I think with such evidence as we need, which will be minor, that this law will definitely [fol. 210] show that the Legislature has deemed it necessary to the people that the people receive the best possible visual care through the efforts of ophthalmologists or physicians, and optometrists, and that it prohibits unqualified people from visually correcting for compensation the eyes of another.

The second section, reading it in conjunction with the first, provides that these optical suppliers, these dispensing opticians, must operate under professional supervision, the same as a doctor's nurse does, the same as a pharmacist does. The Legislature has seen fit not to license the opticians and have them examined as is the case in some of the states; rather, the Oklahoma Legislature has seen fit in the protection of the public to see that these nonprofessional men, who deal with the human eye, do so under the written prescriptive authority of a professional man, who by this law is responsible for his patient's welfare.

We feel that that is a reasonable enactment by the Legislature for the protection of the public, that it has a direct bearing in relation to public health and public welfare, and the evidence will show some of the abuses that

have sprung up as a result of this injunction in the past few years, to where the people now are entitled to protection against nonprofessional treatment of the eye.

Now this measure, if you want to boil it down to its most simple statement, is a measure designed to see to it [fol. 211] that the care of the eyes of the people of Oklahoma is applied professionally and not commercially.

Judge Vaught: I haven't even read your pl adings in this case, so it is all new to me. What do you say to that portion of the Act which would prevent the optician that made the glasses under a prescription by a medical expert, if the patient should break one of the lenses but couldn't take it back to the same optician who made it originally and have it replaced without an additional prescription?

Mr. Daugherty: The law does not require an additional prescription, your Honor. The law merely requires that the optician who undertakes to duplicate have on file in his office the prescription by a professional man for that eyeglass. He doesn't have to go back for a new examination, your Honor, but he must have in his office the prescription of a doctor for that set of glasses in order to duplicate, that doctor being responsible for the care of that patient's eyes; and the evidence will show that you can get a much better, a more accurate duplication from a prescription than you can from the duplicate of the prescription.

Simply, if you are going to copy a masterpiece, you could make a better copy by copying the masterpiece than you would have copying the copy of the masterpiece.

Judge Vaught: Do you contend then that there is noth- [fol. 212] ing that would prevent the optician from making a duplicate pair of glasses, if he had the prescription in his office?

Mr. Daugherty: No, sir, if he's got the prescription he can fit, he can adapt, he can adjust them, he can grind the lenses, he can put them to the face, he can duplicate a lens, he can replace the frame, he can do any of those things, your Honor, so long as he has got the written prescription from a professional man, whom the Legislature has seen fit to give full responsibility for the care of his patient.

Judge Vaught: Do you place the optometrist in the same

position as the ophthalmologist, so far as qualification to write a prescription?

Mr. Daugherty: As far as the examining of the eyes for glasses, yes, sir. I think it will be admitted that both the ophthalmologists and the optometrists are qualified professionally to examine the eyes and prescribe glasses for the eyes.

Judge Vaught: What qualifications does the optometrist have?

Mr. Daugherty: An optometrist in the first place in Oklahoma must meet educational requirements, moral requirements, he must pass an examination, he must be licensed, he is regulated by a board. The course of instruc- [fol. 213] tion is a five year course, being extended to six; and he receives a very intense course in his field. Now he is not only qualified to make an eye examination, but he is trained to detect diseases of the eye. He doesn't treat them. He refers them to a medical doctor who does, but his training with respect to the eye, particularly with refractions, is very, very complete. He is a licensed professional man, and the courts have held optometry to be an unquestionable profession and the plaintiffs admit that.

Judge Vaught: Under the law he could make glasses if he wanted to, couldn't he?

Mr. Daugherty: He could do it; most of them do not, sir.

Judge Vaught: What distinction do you make in his qualifications now to make glasses and the opticians'?

Mr. Daugherty: May I say this, your Honor: The normal practice of the optometrists is to make an examination and reduce that to a prescription, and they send that to a supply house who grinds the lens, puts it in the glasses and sends them back, and the optometrist puts them on the face of the patient, adjusts them. Now the optician, he grinds the lenses and in that kind of an operation, if he is a good optician, why he does the job well. If he doesn't do it well, the optometrist checks it and sees that it is done properly.

The optometrist normally uses a supply house optician. [fol. 214] He's up on the second floor, let's say.

The ophthalmologist normally uses a dispensing optician, prescription goes down to a dispensing optician, and I believe you will find that in most cases the dispensing opti-

cian does not do his own grinding; he sends the prescription to the same supply house that the optometrist sends his to, and gets it back, and he fits it to the face; so the dispensing optician, and that is what these plaintiffs are, except Dr. Rips, are not grinders of lenses, and other people like them perhaps are not, but they may grind, but in most instances they do not grind their own lenses.

So you may have an optician to grind lenses in a laboratory, you may have an optician who dispenses but does not grind.

Judge Vaught: Do you take the position that the optician, after the lenses have been ground, is not in a position to determine whether or not they have been properly ground?

Mr. Daugherty: No, sir, I don't think we take that position, your Honor. We take the position that so long as the optician, whether he be a supply house optician or a dispensing optician, so long as he has the written prescriptive authority of the professional man in the case, that he should be permitted to grind the lens and to fit and adapt and adjust and to duplicate thereafter if necessary.

[fol. 215] Judge Vaught: And dispense them?

Mr. Daugherty: And dispense them, yes, sir. That's the law. This law does not put the dispensing optician out of business. It merely—the Legislature could have done one of two things, in my opinion. They could have either passed a licensing bill where these opticians would be examined and licensed and regulated by a board, in which case they might not need this provision where they must operate under the care and supervision of a professional man; or the Legislature could have done as it did and put these non-professional people, dealing with public vision, put them under the supervision of the professional man who makes the examination and who is responsible for his patient's eyesight. That is all this law does.

Judge Vaught: You conclude then because the optician is not licensed the same as the optometrist, that he should not be permitted to exercise this particular function?

Mr. Daugherty: I don't say that, sir. I say the Legislature had two things it could have done with the same result, and it has gone this way, which we feel gets the job done, the main purpose being to see that the people get professional care for their eyes.

Judge Vaught: Well, sometimes that's the object of a law, and sometimes it's to assist another class.

Mr. Daugherty: Yes, sir.

[fol. 216] Judge Vaught: Now another thing: You have an exception here counsel mentioned. Now you go down to the T. G. & Y. store or one of the five and ten cent stores and you can buy a pair of glasses.

Mr. Daugherty: Yes, sir, those are magnifying glasses, your Honor, which the customer picks out, and there is no fitting to the face by the seller of those glasses. That exception is supported by decisions in other states, for it has been held to be a reasonable, valid exception. The purpose applies to the dime store, where a person goes in and buys a pair of glasses, and there is no attempt made to fit the glasses to that patient's face. He selects them at his own discretion. He is fully responsible and no one else is responsible, but those glasses, your Honor, are magnifying glasses. They do not correct the vision other than magnify. They don't prescribe one kind of lens for one eye and one for the other, and they are not adapted to the face.

When a patient has his eyes visually corrected by a professional man, that professional man under the law is responsible. If anyone else is going to do anything that may harm that man's vision, he must do it under the direct authority of a professional man, much as a doctor's nurse performs under the professional man, and if the doctor's nurse makes a mistake, the doctor is responsible; much the same as the druggist who pursuing the written prescription [fol. 217] of a doctor, and in the case of a druggist you can't take your bottle with the number and go to another drug store and get it filled. It's filled on written prescriptive authority, and that is the law.

Now this law parallels that very much. We will bring to the Courts' attention a dentistry case here in Oklahoma, where the dental laboratory technicians who make the bridgework, teeth and things of that kind, it's been held to be just like an optician should be; he works under the dentist, the dentist is responsible. He can't practice dentistry. This case went to the Oklahoma Supreme Court, and it's a very strong analogy. I won't burden the Court with it now, because I think it will be proper to do so later;

but that is how our Supreme Court feels about the professional care of a bodily ill.

Does the Court have any other questions on that particular point?

Judge Vaught: No.

Judge Wallace: Mr. Daugherty, Mr. Woods made the statement that the bill provided that no doctor outside of Oklahoma could write a prescription and that could be filled, as I understand it. What is your reaction to that statement?

Mr. Daugherty: The law provides that a person fitting glasses must be licensed under the laws of Oklahoma. I believe that Oklahoma can require that professional care [fol. 218] given in Oklahoma should be done by Oklahoma licensed practitioners. I feel that is the basic law.

Judge Murrah: Do you say or do you agree that in Oklahoma the law in question does have the effect of imposing that restriction?

Mr. Daugherty: I would not go that far, your Honors. I think that would be a matter of interpretation.

Judge Murrah: Well, what is your interpretation?

Mr. Daugherty: Well, I don't think the Legislature, perhaps, intended to be quite that strict. It has defined a professional man.

Judge Murrah: That is important and it will be necessary for you to take a stand on it one way or the other. You will not be required to do so at this moment. Certainly the Court will want to know.

Mr. Daugherty: Yes, sir.

Judge Murrah: From the pretrial conference, at least one member of the Court gained the impression that it would be your position that the law did so limit the use of prescriptive authority.

Mr. Daugherty: Yes, sir.

Judge Murrah: You may—you are not bound by this; but I'd like to ask one question which seems to be in order. Will it be your contention that, your interpretation of the statute, that prescriptive authority required under the Act [fol. 219] must be directed to one designated or named optician?

Mr. Daugherty: That is not our position.

Judge Murrah: You will not contend that a prescription issued by one authorized to do so must be directed to any specific optician?

Mr. Daugherty: It must not be directed to any specific optician. It may be given to the patient. He can take it to the optician of his choice.

Judge Murrah: That will be your position?

Mr. Daugherty: That will be our position; with the responsibility, however, for the full effect of any appliances furnished remaining with the doctor.

Judge Murrah: Do you speak for the Attorney General on that point?

Mr. Hansen: Yes, your Honor, that is correct.

Judge Wallace: Let me ask you this question, Mr. Daugherty: With regard to the advertisements that you spoke of, Mr. Woods spoke of, and that the opticians as I understand under this Act 953 cannot advertise in many ways. He is prohibited. Is it your theory that that does not violate, for instance, the Interstate Commerce law or Section 15 of the Constitution?

Mr. Daugherty: That's right, we do take that position, your Honor. We take the position that the right to advertise is not an absolute right, and that it may be regulated [fol. 220] or entirely taken away in the interest of public health and welfare. We feel that is the basis under which the Oklahoma Legislature has seen fit to prohibit all forms of advertising in the field of visual care. There is ample authority for that. I think the last count I made there are twenty-seven states that have regulations prohibiting advertising in the field of visual care. With the exception of a city ordinance in Detroit, those have been upheld. The most recent being in the State of Louisiana, which has just recently been upheld as being a valid exercise of police power in the interest of public health and welfare.

We feel that that is certainly a valid exercise and the abuses that come from advertising glasses and visual care, and so forth, will be explained from the witness stand, I think justifies the Legislature in exercising this prohibitory power.

Judge Wallace: You agree with Mr. Woods in regard to classification of, say, the ophthalmologist, that he is one

that exercises pathological examination of the eye, and that the optometrist, the only thing that he does is to refract, and the optician, of course, does not do either one of those, but merely fits and so forth, grinds to the correct sphere of the work that he is doing?

Mr. Daugherty: I think that's correct, your Honor, with the possible exception of the fact that the optometrist is [fol. 221] trained to detect the diseases of the eye and refer them to a medical doctor for care and treatment or surgery.

Judge Vaught: I might ask you one other question: Now if the optician doesn't grind the lens, if he sends them out, what is his use?

Mr. Daugherty: His use is to, perhaps, fit them to the face. That's about all that he does, your Honor. He may check the lens as it comes back from the supply house to see that the prescription is filled, and then fit the glasses to the face. He should do that pursuant to and under the authority of a professional man.

Judge Murrah: Is that his function, the filling of the prescription that you speak of, the sole function?

Mr. Daugherty: His sole function?

Judge Murrah: Yes. I understand, I am sure the Court understands, the law provides merely that he shall in grinding, fitting, and performing mechanical functions incident to eye care—he may do all of those under the prescription?

Mr. Daugherty: Yes, sir.

Judge Murrah: Under a prescriptive authority?

Mr. Daugherty: Yes, sir.

Judge Murrah: I am trying to fit that concept into your statement just made to the effect that all he would do would be to fit the glasses to the face.

Mr. Daugherty: If he didn't grind?

[fol. 222] Judge Murrah: If he didn't grind.

Mr. Daugherty: If he's qualified, he can grind or if he holds himself out or does grind, if he is qualified he can grind. If he doesn't, it would be my idea the so-called dispensing optician who doesn't grind but sends them to the supply house, when he gets them back he will probably check the lens to see that the supply house has filled the prescription. He would then put the glasses on the patient's face to fit and adapt and adjust those. My personal opinion is

that that is what he would do if he didn't do his own grinding.

Judge Murrah: Is there anything to prevent the optician from maintaining, being also a supplier?

Mr. Daugherty: The grinder?

Judge Murrah: Yes, the grinder.

Mr. Daugherty: No, sir.

Judge Murrah: Anything else?

Judge Wallace: The question was raised there, I think by Judge Vaught, with regard to the convex spherical glasses that are sold probably on the counter at various stores. Now are they permitted under this Act to advertise and so forth?

Mr. Daugherty: I would not think so, sir.

Judge Wallace: They couldn't advertise their wares, binoculars and things like that?

[fol. 223] Mr. Daugherty: I think they could advertise those items, yes, sir.

Judge Wallace: Can an optician do that, can he do the same thing?

Mr. Daugherty: On binoculars I would think so, wouldn't you?

Mr. Hansen: Yes, sir.

Judge Wallace: What about the rental, what is your attitude on that question?

Mr. Daugherty: My attitude, our attitude on that, your Honors, is that going further beyond the advertising prohibition the law prohibits rebates, it prohibits the solicitation of business for doctors by optical suppliers and it prohibits an eye examiner, that is an ophthalmologist or an optometrist, from making an eye examination as an employee of a lay person or group.

Judge Vaught: As a what?

Mr. Daugherty: Make eye examinations for a lay person or a lay group. In other words, it's what we call corporate practice, prohibition against corporate practice, to where the eye examiner is prohibited from—I will read it here: (Quoting) Unlawful for any optometrist or physician to make an eye examination as an employee of a person, firm, corporation, lay body or lay group—and then the inverse, is that it's unlawful for a lay group to procure an examination

[fol. 224] through the hiring of a doctor. That is a prohibition against corporate practice in an effort to keep eye examinations on a professional basis rather than a commercial basis. That would prevent an optician from hiring a doctor and having a doctor make eye examinations.

Now the renting of space, to get to your question, your Honor——

Judge Wallace: I want to distinguish between—Judge Murrah says here you can go down to the T. G. & Y. where they have these things displayed, now they can advertise that. An optician may have those same things, but you say he can't advertise them?

Mr. Daugherty: I believe the Court misunderstood me. I don't think under this advertising prohibition that anyone can advertise the sale of glasses. It so says—no one may advertise or solicit the sale of spectacles, eyeglasses, eye examinations, or visual services. The Court may or may not agree with me on that, but it seems like that is——

Judge Vaught: (Interposing) Take the T. G. & Y., since that designation has been used. If they sell glasses, just as they sell any other merchandise in the store, why wouldn't they have a right to advertise the same as they would any other sale?

Mr. Daugherty: Why wouldn't they have the right to [fol. 225] advertise the sale of glasses? Well, in the first place, the Court may not agree with my interpretation of this provision; secondly, may I say that the whole purpose of this Act, your Honors, is to get visual care of the people of Oklahoma in the hands of professional people who are qualified to give good visual care, and not to let visual care fall into the hands of untrained, unqualified, and unregulated people, who will not give to the people of Oklahoma proper eye care at the proper figure. As I said before, the bill must be considered from its four corners.

Judge Vaught: You are assuming that there is a class in this state that is so conducting its business as not to protect the health of the people?

Mr. Daugherty: I am assuming that the Legislature in its infinite wisdom has found that condition to exist and has legislated against it.

Judge Vaught: I am never questioning the infinite wis-

dom of the Legislature, but just asking you what your position is. Now the one class here that would be affected by this law is the optician, isn't it?

Mr. Daugherty: To a certain extent he is affected, but he is not limited from practicing. The thing he is now required to do is work under the prescriptive authority from the professional man. He is prohibited from doing things that deceive the public to believe he can give eye examina- [fol. 226] tions, fit glasses, which also means causing the public to go to the doctor instead of commercial enterprises where they are not qualified to give him an eye examination. He is affected to that extent, your Honor. It doesn't put him out of business. He wasn't out of business in 1950. They do business on prescriptive authority. That's the way it was up until that time.

Judge Vaught: I assume that is one of the questions that will be covered by the evidence.

Mr. Daugherty: Yes, sir. To answer Judge Wallace's question about renting space: I think that is an extension of the prohibition against corporate practice, and is put in there for the purpose of preventing secret agreements, secret arrangements, subterfuges in avoiding corporate practice or obtaining corporate practice in a sub rosa manner, and that is the reason that I feel that provision is put in there. It belongs very definitely to all of the other provisions of that section, which are aimed at keeping eye care on a professional basis, and to avoid commercial control and influence when the care of the eyes is concerned; to get back to the first two sections, so these people that do optical work and so forth are merely required to do it under the direction and authority and the responsibility of the professional man.

Again, as I say, if I had to boil this law down to a [fol. 227] shortest substance, I would say that it is a bill passed by the Legislature in the exercise of its police power for the purpose of seeing that eye care is maintained on a professional basis of responsibility and is not taken over by commercial interests.

Judge Murrah: Is that all?

Mr. Daugherty: That's all.

Judge Murrah: The Court has extended your argument

probably further than you anticipated, but would it be burdensome for you to transcribe that, your statement? I am sure that it will be beneficial to the Court. However, we don't want to impose on you to the extent of——

Mr. Daugherty: Be glad to do that, your Honor.

Judge Murrah (Continuing:) —of being burdensome.

Mr. Daugherty: I believe the State can afford it.

Mr. Woods: If the Court please, I would like to make just two brief observations in reply to what Mr. Daugherty has said.

First, as I understand, the State takes the position that under Section 2 the prescription does not have to be directed to any specific optical supplier. I want to make this observation in connection with that: They also say and recognize that that same section provides that the physician is liable for the spectacles or eyeglasses issued under that prescription. Our evidence will show that the effect of that [fol. 228] is to deny and remove from people like plaintiffs the right to compete for that because the physician, being legally responsible for the acts of the optician, is going to send that prescription only to one optical supplier.

Now you can lay aside the optometrist, because the evidence will show except in rare instances that they never issue a prescription, so it boils down to the fact that you are forcing the ophthalmologist to specify in his prescription the optical supplier who is going to fill that, and if you do that, then you have effectively removed the right to compete in that field of business from the opticians.

The second thing I want to make clear is that as I understand, the law of Oklahoma prior to the enactment of House Bill 953 required a prescription to an optician from either an optometrist or a licensed medical practitioner, an ophthalmologist, before eyeglasses could be formulated. Those are the two remarks I wanted to make.

Judge Vaught: Let me ask you this question: Now if under the law prior to the enactment of this law, it was necessary for an optician to have a prescription before he could get the glasses, what was the purpose of this law in regard to that point?

Mr. Woods: It is our contention, if your Honors please, that the purpose of this law is to remove from the optician

his function of fitting, adjusting and adapting glasses to [fol. 229] the face, among other things, the duplicating and replacement.

Mr. Daugherty: If Judge Vaught addressed that question to me about how the law was changed, the rule before was not codified in the statutes, your Honor, requiring a——

Judge Vaught: (Interposing) What?

Mr. Daugherty: The rule that the optician must have a prescription to fit a pair of glasses was not the codified law of Oklahoma prior to this law. I know the Attorney General's Office may have construed the optometry and medical——

Judge Vaught: (Interposing) I didn't understand.

Mr. Daugherty: I understand that it was not in the formal statutory law prior to this law.

Judge Murrah: Well, I think that perhaps that will be a part of your argument of your case. It may be controversial. Now are you prepared to proceed with your testimony?

Mr. Woods: Yes, your Honor.

Judge Murrah: Call your witness.

Mr. Woods: Call Dr. Coston, if you please.

Tullos O. Coston, called as a witness on behalf of the plaintiffs, being of lawful age and having first been duly sworn, testified as follows:

[fol. 230] Direct examination.

By Mr. Woods:

Q. Will you state your name, please, sir?

A. Tullos O. Coston.

Q. And are you a licensed medical practitioner in the State of Oklahoma?

A. Yes, sir.

Q. Do you specialize in any particular branch, Doctor?

A. Ophthalmology.

Q. Doctor, I will ask you, are you appearing voluntarily today?

A. No, I come as a result of subpoena. I would like to make this statement at the outset, that my presence here in giving testimony in no way indicates that I approve of all of the practices of the Lee Optical Company, the plaintiff.

Q. Very well. You say that your practice is that of an ophthalmologist?

A. Yes.

Q. Would you just very briefly and generally describe what the practice of an ophthalmologist is?

A. Well, it consists of examining, diagnosing, treating various diseases of the eyes, as well as doing refraction and prescribing proper glasses. The treatment may be medical or surgical, consists in consultation cases sent by other physicians and helping to make diagnoses of general illnesses.

[fol. 231] Q. Yes. Doctor, would you state for the record your medical education and your experience and also any societies that you are a member of or have served on?

A. Well, I graduated Johns Hopkins Medical School, 1930, had an internship in emdicine one year, four years' training in ophthalmology at the same institution, and one year on the staff of Johns Hopkins University and Hospital. I have practiced, in Oklahoma City, ophthalmology since 1936.

Q. Yes, sir.

A. I belong to the County and State Medical societies, the American Medical Association, the Academy of Ophthalmology, and the Johns Hopkins Surgical Society.

Judge Murrah: The Court will take judicial notice that the witness is an outstanding, pre-eminent ophthalmologist.

Mr. Daugherty: We admit the——

Judge Murrah: (Interposing) Not only in Oklahoma but the whole country.

Mr. Woods: Very well, your Honor.

By Mr. Woods:

Q. In the course of your practice, Doctor, do you do refractions?

A. Some refractions.

Q. When you have refracted a patient's eyes, tell me what you do.

[fol. 232] A. After I arrive at——

Q. (Interposing) Your conclusion.

A. Write out a prescription. If the patient needs glasses, a prescription is written for the glasses on one of my prescription blanks, and given to the patient. He is told to take that to a dispensing optician, several of whom I give him the names of. If he wishes to know a specific one, knowing no one, I tell him where they are located. He usually chooses one by the location; and if he wishes me to name one specific one, I name one to go to.

Judge Vaught: What do you mean by "refraction"?

The Witness: Fitting of glasses.

Judge Vaught: Fitting of glasses.

The Witness: That's the term we give to the measaring of the eye for glasses.

Judge Vaught: That's when you examine him and have him to read that little card at the far end of the——

The Witness: Yes, sir, that's part of it.

Judge Murrah: That does not necessarily include a pathological examination?

The Witness: Oh, no, that's only a small part of the complete eye examination.

By Mr. Woods:

Q. By refraction you measure what the refractive error of the eye is; is that not in a general way what's done?

[fol. 233] A. In general.

Q. And when you have found that refractive error, you can correct or compensate for it by the prescription of the proper lenses?

A. Yes.

Q. Am I correct in that statement?

A. (Nods affirmatively)

Q. Now Doctor——

Judge Murrah: (Interposing) The answer is yes?

The Witness: Yes, we give the glass that will either make the patient see better or make him more comfortable, or in a case of a cross-eyed child, it may help in straightening

the eyes. There are three reasons to wear glasses. One is to make a person see better. He can wear them or not wear them as he chooses. The second reason is to allay some headache or some eye ache, some discomfort that he has; and the third reason is to help any correction of cross-eyes. Outside of sunglasses and protective industrial glasses, which I am not referring to, those are the only three reasons to wear glasses.

By Mr. Woods:

Q. In that connection, Doctor, if a person has a refractive error in his eye, and doesn't obtain glasses, is his eye going to be damaged or injured in any way?

A. There will be no change in the anatomical structure [fol. 234] of the eye, there will be no damage whatever whether he wears proper glasses or does not.

Q. Is it primarily that he won't see as well as he would if he had proper glasses?

A. He may not see as well, or may have headaches or he may be uncomfortable, but the fact that he needs some glass that he doesn't have, or if he is improperly fitted, even, it does not damage the structure of the eye in any permanent way.

Q. Now Doctor, when you write a prescription, what do you ordinarily include in that prescription?

A. Well, you have the patient's name and date, and you have the strength of the lens, spherical strength, maybe, only, maybe there's a cylinder in there, maybe a prism, may have an addition for reading; he may have two pair of glasses, he may have bifocals. You may indicate sunglasses if he desires, and you may indicate the type of bifocal, if you think it best if he needs bifocals. In a high refractive error you indicate, I usually indicate the distance that the lens sat from the eye when I measured the error in my office so the optician will know what distance to place the strong lens, or compensate for it if he can't place it the same distance I had it in my trial case.

Q. By "compensate for it", you mean if it's moved outward or moved in, he will change the power of the lens? [fol. 235] A. If he has to set the lens closer to the eye than I did at the time I refracted the patient, he will have

to compensate by tables and make the glass stronger or weaker in its spherical correction for that reason.

Q. You have the optician do that compensation?

A. Optician does all of that.

Q. Do you include in your prescriptions ordinarily anything with respect to the frame?

A. No.

Q. Do you include in your ordinary prescription anything about the distance between the pupils of the eyes?

A. No.

Q. To whom do you leave the responsibility for measuring that so-called interpupillary distance?

A. That is the responsibility of the optician.

Q. And what about the frame, the type of frame, the selection of that?

A. Someone has to show the patient various frames for their selection. That is a very important point to the patient. Any frame would satisfy me, if he has the proper frame to hold the glasses, but the patient is very, as all of you know who wear glasses, is very conscious of the frame. Someone has to merchandise them, someone has to present them and to show them, and that is a function of the optician to the ophthalmologist. He serves us in that way.

[fol. 236] Q. Yes, sir. Do you put anything in your prescriptions pertaining to the fitting, adjusting or adapting of the frame to the face?

A. No.

Q. And on whom do you depend for that fitting, adjusting and adapting, Doctor?

A. The optician.

Q. Doctor, do you happen to have one of your prescription blanks here? Could you give an example to the Court of a typical average prescription that you would write?

A. I don't have one. I will write it on a piece of paper.

Q. All right, sir.

Judge Vaught: Better make it "John Doe", Doctor. Someone might use that.

The Witness: All right.

Judge Murrah: Proceed.

By Mr. Woods:

Q. Doctor, would you state how that prescription was written and in general what the information is on that?

A. You want me to read these figures?

Q. Yes, if you will, please.

A. Well, Mr. John Doe, October 26, 1953, RX—our symbol for "I prescribe"—distance, sphere plus one twenty-five, cylinder; sphere, that's the right eye, and sphere plus one fifty, the cylinder plus twenty-five at one [fol. 237] eighty, left eye; and near—means the amount of correction added to that the patient must have to read with, add plus two twenty-five each, Ultex B. bifocal.

Mr. Woods: Would you mark that, please?

(Plaintiffs' Exhibit 1, being the prescription prepared by the witness, was marked for identification.)

By Mr. Woods:

Q. You mentioned a cylinder and a prism in connection with prescribing eyeglasses. Would you explain just very generally what a cylinder is and what a prism is?

A. Well, a cylinder is a lens ground in such a manner as to correct astigmatic error. Now astigmatism means that the eye is lopsided. It is not quite round. That is usually a fault of the cornea, of the front round surface of the eye; may be in the lens but usually the astigmatic error is a result of the irregularity in shape of the front of the eyeball. The lens can be ground in a way to counteract that because the rays come in at bent angles, and the lens which we call a cylinder has a correction only in one meridian, and that will correct by, after we have tested for the proper meridian, it will correct the astigmatic error. When I say "correct", I mean it counteracts in the glasses. It doesn't change the physical fact that the astigmatism still exists in the eye.

A prism is a grinding of the lens in a way to displace the image. One may have a muscular imbalance in the eyes making the right eye higher than the left, or tending [fol. 238] to go higher than the left, due to a weakness or imbalance in the muscles, and the prism simply allows the

eyes to remain more one above the other and still have comfortable binocular single vision because it displaces the image as it comes into one eye or the other and allows the eye to have less strain, less pull.

Q. Now Doctor, I believe you also a little while ago mentioned something with respect to high power lenses or high correction; what do you in general refer to in that?

A. Well, most lenses that I would say are high errors would be over two, three, four on up, three or four diopters and over are getting to be fairly high corrections. Below that, moderate, and below one diopter, slight correction.

Q. Is it true or is it not true that as the power of the lens increases, then there is a little less tolerance so far as any error in the grinding of the prescription?

A. That's true.

Q. What percentage of prescriptions for eyeglasses, in a general way, are of high power lenses as you would term them?

A. I wouldn't know exactly, but the percentage of refractions over three or four diopters would be maybe ten percent, or less.

Judge Murrah: Ten percent?

The Witness: Ten percent or less.

[fol. 239] By Mr. Woods:

Q. And the bulk of the balance would then be lower powers?

A. (Nods affirmatively.)

Q. Going back to your acts that you would perform you have related that you would give a prescription such as Exhibit 1, as an example, to the patient?

A. (Nods affirmatively.)

Q. And the patient would then take that to an optician for filling?

A. (Nods affirmatively.)

Q. Would you request the patient to come back to you for checking of that prescription?

A. Well, I have the patient come back if it's of a high error, where a difference in the center of the lenses would make for more discomfort to the patient.

Q. Now in the difference in the centering of the lens, are you referring to the pupillary distance?

A. Pupillary measurement and the grinding of the optical centers in proper place.

Q. In cases where you have not prescribed high power lenses, I take it you do not request the patient to come back, necessarily?

A. No, the glasses are all brought back to the office and they are checked on the lensometer for strength, and the patient is told if he has any discomfort or any difficulty, he [fol. 240] is to return, but the low errors, the patient is not seen with the glasses.

Q. Yes. Who does the checking on the lensometer in your office?

A. One of my secretaries is trained to use the lensometer, and if she finds any discrepancies, she calls one of us to check.

Q. Now Doctor, are the practices that you have related, you have told in connection with the prescription of eyeglasses, the practices that are generally followed by ophthalmologists in the State of Oklahoma?

A. I would say so.

Judge Murrah: Say so?

The Witness: Yes; I would like to qualify that to this extent, the ophthalmologist practicing in the smaller towns, where there is no optician available, he has to be the optician, the ophthalmologist, and all. He has to show the frames, sell the frames, fit them to the face, and see the patient with the glasses later and so on. He is the only one to do it, and there are many of those men in our state, but where opticians are available, the practice is generally as I gave it.

Judge Murrah: The ophthalmologist?

The Witness: Yes, sir.

Judge Murrah: Sometimes he is also a dispensing optician, or that is to say he sometimes dispenses, he grinds [fol. 241] and dispenses?

The Witness: He doesn't grind. He does do the duties of the ophthalmic dispenser.

Judge Murrah: But he does have them ground?

The Witness: He sends them away to be ground.

By Mr. Woods:

Q. Doctor, would you state what part, if any, the ophthalmic dispenser, the optician, occupies in the field of eye care, from the ophthalmologist's point of view?

A. Well, he's very much to us as the pharmacist. However, there was a time when the doctor had to compound and make up all of his pills and medicines, and a doctor could still do that if he desires to do that, but it's so convenient, it's so modern, we have come to a different day in medicine now. In ophthalmology, the ophthalmic dispenser is to the ophthalmologist what a pharmacist is to the general physician, and what the pharmacist is to us. We prescribe many medicines. We have no time. If I had to get these patients down and fit their frames and merchandise the frames, and show them the different types of glasses and have them back and fit them, then adjust them every time they knocked something crooked about the frames and they came to me to have that done, I would neglect many serious problems in very great need of attention. The ophthalmic dispenser is one of our right arms as practicing modern ophthalmologists.

[fol. 242] Q. Is he a necessary element of that practice?

A. Well, he's very necessary.

Q. Doctor, in your opinion, is it necessary for the optician to have the training and the educational background of an ophthalmologist to properly perform these functions you have related?

A. No.

Q. And is it necessary for that optician to have the educational training of an optometrist to perform the functions you have related that he does?

A. No.

Q. In your opinion, how would you describe the order of the acts of the optician, what is their nature, how would you classify them?

A. Well, the dispensing optician takes the ophthalmologist's prescription, and he interprets it as to the lens, has the lens ground according to the prescription. He shows the patient the various frames. After the selection of frames, if new frames are bought—he may not sell new frames, he may take the old frame, but measure the pupil-

lary distance to be certain that the old frames are correct, see that the lenses are going to be ground according to the proper centering. In other words, he settles the question of fitting of frames, the selection of frames. He has the lenses he does grind in his own shop, many of them do that in larger areas. In smaller areas the dispensing op- [fol. 243] tician doesn't often have a shop, but he sends it away; but he is responsible for the proper lens strength as we have ordered. That is sent back to him. He puts them in the frame and in other words, he mounts them. He has the patient come back and he puts the frame on the face. He adjusts and adapts, and is certain everything is centered properly, the frames are the proper size, and that they are comfortable; and in general that is his function.

Q. What type of activity or skill on his part is required for those functions?

A. Well, quite a high degree of skill. It takes a considerable amount of skill to fit frames, adjust glasses, and have all of that mechanical measurement and performance done properly.

Q. In your opinion, is that of the same order as a professional man's knowledge or education required?

A. Not a learned profession, no; but a skilled craft.

Q. Skilled craftsman?

A. Yes, sir.

Q. From your experience as a practicing ophthalmologist, in what manner would you say opticians generally perform those functions, in comparision with for example optometrists or ophthalmologists?

A. Well, ophthalmologists are not trained to perform those functions except in rare instances. Opticians are [fol. 244] quite well trained to perform those functions, proper opticians. The optometrist has training in that field also in the course of training. As to what extent the optometrist, how you could compare him with the optician in such skill, I have no personal knowledge, but it would seem reasonable that one performing these duties only would be more highly skilled in it.

Q. And you are referring then to the optician?

A. Yes, the optometrists are going more and more to examination of the eyes and diagnosing diseases, and they

are getting more and more away from that very thing themselves.

Q. By your testimony you mean that an optician acquires greater skill and dexterity from the frequency of the work he does?

A. I would think so, definitely.

Q. Doctor, with respect to the duplication of broken eyeglasses, how in your practice is that handled?

A. Well, if the patient has been examined only recently, by recently meaning in six or eight months, and he is not having any discomfort, he is told to have the lens replaced by the optician who ground them who has the prescription on file. If he doesn't want to do that, we have the prescription on file in our office and the history of the case. If it's been some time since he's had his eyes examined, [fol. 245] and it would be natural to assume that he might need a reexamination, very frequently in my practice we are just too busy to do it that day. He may have a very important day in court coming up and he needs glasses. He is told to have the old glasses replaced, make an appointment as soon as we can get to him, or go to someone else if he had rather, but for the moment he is told to have the old lens replaced as soon as possible, then have the eyes reexamined.

Q. Now can you state just in a general way what is done in replacing of that lens by the optician?

A. The optician may do one of several things. He may call the physician's office who prescribed the glasses. That is the general custom, if he knows who it is. He calls the office and if it's in the city, and finds out what the prescription was, if he didn't fill it originally. If the patient doesn't know who ground the glasses, or if he's from out of the city, out of state, if he has enough of the lens, broken lens, he can determine on a lensometer the strength of the lens with a sufficient amount of the lens. He can't tell with a *g*ragment and grind the glass. He can't do that in all cases. A broken lens—he may not be able to determine something about the axis of the cylinder and so on, but he can do it in that way if he has enough lens, we will say a piece of lens big enough.

Q. And with the exception of these instances that you

[fol. 246] have mentioned, which I take it are relatively infrequent, it is a correct measurement, is it not?

A. Oh, it's very, very close; close enough to be within the tolerance of the eye.

Q. You mentioned the tolerance of the eye. Would you state for the Court whether or not the eye has a great tolerance or a small tolerance.

A. Well, the eye has a considerable tolerance, which will vary from patient to patient, but a considerable amount of tolerance as to a proper or an improper lens.

Q. State whether or not an improper lens or an error in the grinding of the lens can cause permanent injury to the eye of a person.

A. An error in the grinding of a lens could not cause any permanent damage to the structure of an eye.

Q. Doctor, I will ask you if under the law of Oklahoma, you are held liable for the glasses dispensed pursuant to a prescription of yours, will you issue prescriptions and permit them to be taken to any optician that patient might choose?

A. No.

Q. What will you do if that is the situation, assuming what I have said is the law?

A. Patient will be directed to an optician I know to be reputable and reliable.

Q. Now some mention has been made of the type of [fol. 247] glasses sold by T. G. & Y. stores, or dime stores. would you explain just briefly what those glasses are?

A. Well, they are spherical glasses which enable the individual, if he happens to have the type of eyes that those glasses will help, they help him to see better. Maybe he needs only a reading glass, and those cheap glasses will have enough power to enable him to find one by going down the counter wich which he can read. Patients occasionally get them even to see at a distance with, if they just happen to be such a case that they will improve their seeing. Those are generally older people who do that, or someone who has lost his glasses suddenly or has broken them and has to see that day.

Q. Yes, sir.

A. I mean the exigencies of the moment might cause

any of us in this court room to go down and get a pair. That's all they do. They are of that type of glass. As far as whether that is harmful or not, in my opinion that does no harm whatever. If the patient wants to wear that kind of glasses, he may wear them without hurting his eyes in any way. They may give him a headache. If he doesn't mind a headache, let him wear them. It doesn't damage him in any way.

Q. Doctor, in your opinion, is it possible to include in your prescription a prescription for fitting, adjusting and adapting eyeglasses to the face?

[fol. 248] A. No, it isn't. I mean, it's conceivable that it could be done, but I'm not trained to do that, and would feel that I was giving a very inferior service. Besides, I don't have the time to take away from serious cases to enter into that type of thing.

Q. Doctor, in your opinion, is it in the interest of the health and welfare of the people of Oklahoma to prohibit the filling of prescriptions for eyeglasses written by ophthalmologists who reside out of the State of Oklahoma?

A. State that again.

Q. Is it in your opinion in the interests of the public health and welfare of the people of Oklahoma to prohibit opticians from filling prescriptions for eyeglasses written by ophthalmologists residing outside the state?

A. It is not in their interests. It is against their interest, and it would make a very awkward situation. Many of our patients, many of our people in Oklahoma, go to out of state oculists, ophthalmologists, many of them, and are given prescriptions. When they get home with their prescription, what would they do with it? It couldn't be filled. They would have to then seek an ophthalmologist within the State of Oklahoma and have the examination done all over again.

Q. Dr. Coston, I will ask you if you are a member of any committee that is working in any way in connection with opticians or opticians' licenses or——?

[fol. 249] A. Well, yes, there is a movement to prepare and try to establish a licensing act for dispensing opticians in Oklahoma.

Q. What is that committee, of what parent body is that a part?

A. Well, the State Medical Society, we are—is going to enter into it, and the various ophthalmologist in my opinion, to help bring this about.

Q. In your opinion, if there are any evils existing in opticianry, can those be corrected by such licensing measures?

A. I would say the major evils could be.

Q. Yes, sir.

A. In my opinion that is the way that should be done.

Mr. Woods: That is all. You may inquire.

Cross Examination.

By Mr. Daugherty:

Q. Dr. Coston, when a patient comes to your office in search of eye care or in need of glasses, do you consider that a professional relationship is created between you and that patient?

A. What is the question?

Q. When a patient comes to your office with defective vision and in search of glasses——

A. Yes.

Q. (Continuing:) —do you consider that the doctor-[fol. 250] patient relationship is created between you and the patient?

A. That it is created?

Q. Yes.

A. Well, the relationship would have to be created.

Q. Do you consider that, of course, a professional and confidential relationship?

A. Yes, sir.

Q. And Doctor, do you consider yourself responsible professionally for the eye care of that patient?

A. Yes.

Q. Should an optician undertake to grind lenses and fit the glasses on the face of a citizen of Oklahoma, unless he has the prescriptive authority to do that from a doctor, either optometrist or ophthalmologist?

A. I don't think it's necessary that he have a prescription.

Q. You mean that an optician could grind a lens and

fit the product to the face without some doctor making an examination?

A. If he has a prior lens to go by.

Q. Take in my case, Doctor. I have no glasses. Before an optician should undertake to grind lenses for me and fit them to my face, should he have a written prescription?

A. Well, he would have to have. Where would he start?

Q. That's what my point is, Doctor, that an optician does need a written prescription before he can grind lenses [fol. 251] and fit them to the face.

Mr. Duvall: Your Honors please, make an objection to that as a dual question, because he speaks of grinding the lenses and fitting them to the face. They are two separate functions.

Judge Murrah: Very well.

Mr. Daugherty: I will rephrase my question.

By Mr. Daugherty:

Q. Doctor, my question is, that an optician is not qualified to make an eye examination?

A. Correct.

Q. And before he would undertake to grind lenses to correct defective vision, he would have to have a prescription from one qualified to make an examination?

A. Or a pair of glasses in his hands he could duplicate.

Q. My question is, he would have to have the prescription, or as you say, a set of glasses in his hands?

A. Yes.

Q. Do you feel that people that do not have glasses but who need to have them and who would get them from an optician, should first have an eye examination by either an optometrist or an ophthalmologist?

A. Now you are speaking of someone who has——

Q. (Interposing) Has no glasses.

A. Yes, that's correct.

[fol. 252] Q. Doctor, I believe you stated that your prescription sometimes contains information about the working distance or the distance those glasses should rest before the eyes?

A. Yes, sir.

Q. Does your prescription sometimes contain information about, say, being off axis or off center?

A. Occasionally.

Q. You have instances of that kind?

A. Rare.

Q. I believe you testified that ill fitting glasses will create no permanent damage to the eye.

A. Yes, sir.

Q. Will ill fitting glasses result in a loss of efficiency to the patient?

A. Why, it could.

Q. Will ill fitting glasses sometimes aggravate whatever condition the patient might have in the way of eye trouble?

A. That is too vague, that is too general.

Q. Would it?

A. It would make them tear more, or get redder, it might, they might; it wouldn't cause any serious anatomical permanent damage to the eye.

Q. Wouldn't there be a loss of efficiency; there would be discomfort, Doctor?

A. Could be.

[fol. 253] Q. What about a condition of nervousness? Would ill fitting glasses tend perhaps in some cases to aggravate a nervous condition?

A. Could be. That would depend on the basic type of individual, but it could do it in some cases.

Q. Doctor, your written prescription is the result of your examination, is it not?

A. Yes, sir.

Q. You write down exactly what you want in the way of lens, that is its grinding?

A. (Nods affirmatively)

Q. Now isn't there an allowable tolerance as to how that lens may come back from the optician?

A. Very slight tolerance.

Q. But there is some tolerance?

A. A little.

Q. Now if that lens should then be duplicated on a lensometer, would that lensometer reading be your prescription, or would it be whatever prescription the grinding resulted in?

A. State that again.

Q. All right, sir. In other words, you make an eye examination, you put down exactly what you want.

A. Yes.

Q. Now if that prescription is filled, there is a tolerance [fol. 254] within which it might be filled?

A. Right.

Q. Which, I take it, means that it doesn't quite comply with your prescription.

A. Yes.

Q. But within an acceptable tolerance?

A. Yes.

Q. Now when that lens is put into that machine to ascertain its strength, and assuming that you have a skilled operator and a properly adjusted machine, will the prescription you get from that machine be the prescription of that lens as ground and not necessarily as you prescribed it by your written prescription?

A. It would be within the limits of tolerance.

Q. Well, it would be whatever the lens was ground at, would it not, Doctor?

A. Yes, as far as the tolerance of the lensometer will let it be that.

Q. Let me give you this case: Assuming that you prescribe one seventy-two and one-half axis, if it came from the optician at one seventy-five, would that be an acceptable tolerance?

A. Only in a small error, not in a large error.

Q. Very well. Now assuming that it came back at one seventy-five and it was in the acceptable tolerance, in your [fol. 255] opinion, and it was undertaken then to duplicate that lens by reading on the lensometer, would that lensometer reading be one seventy-five, assuming that you have a qualified operator and well adjusted machine?

A. Well, it would be so close, it would be inconsequential if it were off any.

Q. All right, then if that lens was duplicated by the optician, would there be another tolerance then allowable on that lens?

A. It would be an allowable tolerance in the hands of a good optician.

Q. Could it be 177.5?

A. You are getting your tolerances a little out of line. I don't see how that applies. You are getting into a specific case.

Q. Doctor, what I am trying to point out is that if a patient's glasses are duplicated time and time again, with this tolerance cumulative, assuming that in some cases it would be all cumulative in the same direction, would that man eventually end up with a pair of glasses that would be considerably off axis, and off axis enough to be ill fitting?

A. It's conceivable, but if you want to speculate, the error might be one way or the other, and if he's fool enough to go twenty-five years buying glasses that way, all right, but it won't do him any harm.

[fol. 256] Q. Well, he might have a pair of ill fitting glasses, though?

A. He might.

Q. They could cause him discomfort?

A. They might.

Q. Nervousness, loss of efficiency?

A. Might.

Q. Beg pardon?

A. Might be.

Q. Are there also cases where an optician should not undertake to duplicate a fragment of a lens?

A. Oh, yes, if he doesn't have enough of a fragment.

Q. If the optician undertook to duplicate that fragment, would the patient probably receive a pair of glasses which would be the result of guess work, perhaps ill fitting?

A. He might.

Q. Could it be possible that the patient would receive a pair of glasses that would be off axis?

A. He might.

Q. Off center?

A. Could be.

Q. Now if on the other hand the person undertaking to do that duplication had a written prescription, would he not get the proper axis and proper center of the glasses?

A. That would be better.

Q. That would be better, would it not, Doctor?

[fol. 257] A. (Nods affirmatively.)

Q. Do you think it would be better to try to duplicate a

pair of glasses from your prescription more accurately than to duplicate it with a pair of glasses the optician grinds pursuant to your prescription?

A. It would be some better, usually.

Q. Do you advocate, Doctor, that people should have rather frequent eye examinations to see if there are any changes in the condition of their eye?

A. Well, I don't advocate any certain time interval. In general we tell them two years, two or three years.

Q. That would be advisable, in your opinion?

A. But that varies from patient to patient.

Q. Doctor, do patients sometimes come into your office in search of glasses, and you find from your examination that they do not need glasses?

A. Yes.

Q. How often does that happen, just in your best judgment?

A. Well, in my own practice it doesn't happen too often, but I would say that is not an uncommon thing.

Judge Vaught: What was the question? I didn't get that.

Mr. Daugherty: The question was whether or not some patients came to him for eye examination and after his examination he found the patient needed no glasses.

[fol. 258] The Witness: It's rather frequent.

By Mr. Daugherty:

Q. As to the frequency, how often does someone come to your office thinking they need glasses but you find from the examination that they do not?

A. It would be rather frequent. I don't have so many cases for refraction, but in general ophthalmologists would find that was fairly frequent.

Q. Of course, you do not fit them with glasses if they don't need them?

A. No.

Q. Is it your opinion that actions to correct defective vision should be done, as far as the examination is concerned, by a professional man?

A. Yes.

Q. Are there any professional people qualified to do that other than ophthalmologists and optometrists in Oklahoma?

A. No.

Q. Do you agree with the provision of this Act that unqualified persons should not be permitted to visually correct for compensation the eyes of another?

A. How was that stated now?

Q. Do you believe that no unqualified person should be permitted to visually correct for compensation the eyes of another?

[fol. 259] A. Yes.

Q. If a person is in need of attention for defective vision, should he go to a doctor for his needs in that connection; by that I mean an ophthalmologist or an optometrist?

A. Yes.

Q. Is that where his search for glasses should start?

A. Yes.

Q. Do you think if a person is in need of glasses that he should go to an unqualified person in order to get glasses?

A. No.

Q. You do consider it a bodily ill, that is defective vision?

A. Well, in what sense?

Q. Well, in a medical sense.

A. It's not a disease.

Q. I know, but it's a bodily defect or bodily ill, in a general way, is it not?

A. In a very general way.

Judge Vaught: Would you say that the health of an individual should be affected by the character of the glasses that he wears?

The Witness: Only, your Honor, someone who might be highly nervous, and that would just be one more little thing to influence their general health; not per se would improper glasses do any damage to an individual.

[fol. 260] By Mr. Daugherty:

Q. But there could be a loss of efficiency, discomfort, and aggravated condition of the patient, nervousness and so forth?

A. Could be.

Q. Doctor, I believe you feel that the people of Oklahoma are entitled to the best possible visual care, are they not?

A. They are.

Q. Isn't public vision a matter of importance to the State of Oklahoma?

A. It is.

Q. If all the glasses of the people of Oklahoma were melted to be destroyed, would there be an effect on industry?

A. Yes.

Q. Efficiency of the country?

A. Do you really think I have to answer that? It's obvious.

Q. Doctor, do you feel that eye examinations should be made professionally by doctors acting in professions?

A. Yes.

Q. Do you feel that eye examinations should be done with commercial control and commercial interests predominating?

A. No.

Judge Vaught: Doctor, do you know of any opticians who pretend to make examinations?

The Witness: No, I don't.

[fol. 261] Mr. Daugherty: That's all, thank you.

Redirect examination.

By Mr. Woods:

Q. Just one question: In your opinion, Doctor, is advertising by opticians detrimental to the health and welfare of the people of Oklahoma?

A. Proper advertising isn't.

Mr. Woods: That's all, thank you, Doctor.

Judge Murrah: I just want to ask one question, which I think perhaps summarizes the crux of this matter: Would you consider it detrimental to the visual welfare of a patient of yours, for whom you had issued a prescription for a refraction of his eyes, to return to a qualified optician to have that prescription refilled for any reason, that is because he lost his glasses or because they were broken; but

they were broken and he had a fragment of the eyeglasses which would enable a qualified optician to refit or to regrind them?

The Witness: It would not be detrimental.

Judge Murrah: Without returning to you?

The Witness: It would not be detrimental.

Judge Murrah: (Continuing) For an additional examination or another prescription; would you expect him to do so, or do you instruct your patients to do so in those instances?

[fol. 262] The Witness: Yes, I instruct them to have the optician to replace the glasses, and then if sufficient time has elapsed that it would be natural to assume the eyes might have changed, to make an appointment and have the reexamination when it can be done.

Judge Murrah: Now in the practice of your profession in the highest order, do you know of any objection or any detriment that would result to the visual care of a patient if he returned to a qualified optician to have his prescription refilled without first coming to you?

The Witness: No, it wouldn't be detrimental.

Judge Murrah: Well, "detrimental"; it would not only not be detrimental, but is that the prescribed practice?

The Witness: Yes.

Judge Murrah: In your profession.

The Witness: Yes, until such time as he can have a reexamination. In other words, it's not so important whether he have that lens replaced without a new examination or not.

Judge Murrah: Well, of course, that is professional care, whether he should need new glasses or not for some pathological condition or because his arm got shorter or something like that.

The Witness: But there is nothing wrong in that practice as you state it.

Judge Murrah: Yes, professionally?

[fol. 263] The Witness: Right.

Judge Murrah: Or that you consider, as a physician, in any way detrimental to the welfare of one of your patients?

The Witness: That's true.

Judge Murrah: Under similar circumstances.

The Witness: Yes, sir.

Judge Murrah: Thank you.

Mr. Daugherty: May I ask one question, if the Court please?

Recross-examination.

By Mr. Daugherty:

Q. But of course, the optician should have the prescription for glasses when he comes back to have them filled, still have your prescription?

A. He should have and he would have it, as the Judge stated the question.

Judge Murrah: Well, he either would have the prescription or the optician would have the prescription. In other words, of course he couldn't regrind the glass without a prescription of some kind. I'm assuming, of course, that he would either have it in his physical possession or it would be available.

The Witness: Or he can take the lens, if he had a sufficient piece of it, and neutralize it and grind it from that. There is nothing wrong with that practice in the hands [fol. 264] of a qualified optician who will not try to grind the lens that he can't tell the strength of.

Judge Murrah: But if I lost my glasses, and I lose them all the time because I don't wear them—if I wanted two pairs of glasses, would you consider that detrimental to my visual care if I took these glasses back to an optician, any optician, either the one who originally dispensed them or to another one——

The Witness: (Interposing) It would not be.

Judge Murrah: (Continuing) ——and ask him to duplicate.

The Witness: It would not be detrimental, and in fact it would be the sensible thing to do. If the other glasses are satisfactory and you want a duplicate pair, why have the extra expense of another examination and all of that, when you are happy with what you have. Have them duplicated. He can read that on the lensometer without a prescription and arrive at the strength accurately, more accurately than you could under a new examination and give your answers subjectively. The lensometer is a very accurate instrument,

within very slight errors, and your glasses could be duplicated absolutely by a good optician within limits of tolerance.

Judge Murrah: Yes. You do not consider those limits of tolerance of sufficient importance to require the patient [fol. 265] to return to you?

The Witness: I do not.

Judge Murrah: To determine whether or not he did get a pair of glasses, a duplicated pair of glasses within those accepted tolerances, is that right?

The Witness: That's correct.

Judge Murrah: Is that an intelligent question?

The Witness: Yes, sir, it is.

Judge Murrah: Then you would not, if I should be so fortunate as to be your patient and you prescribed these glasses for me, and I needed additional glasses, or broke them, lost them sometime within two or three years, you would not expect me to return to you for additional care or examination?

The Witness: Not——

Judge Murrah: (Continuing) Either before or after I had the glasses ground, duplicated.

The Witness: Not for that reason alone, no.

Judge Murrah: Unless there is some other reason.

The Witness: Yes.

Judge Murrah: In that question, I assume, of course, that there is a professional, pathological reason——

The Witness: Yes.

Judge Murrah: (Continuing) ——that is entirely outside of the realm of our inquiry here.

[fol. 266] The Witness: Yes.

Mr. Daugherty: May I ask one question, please, your Honors:

By Mr. Daugherty:

Q. With reference, Doctor, to duplicating a set of the Judge's glasses, are you assuming that you have a skilled operator on the lensometer and a lensometer that is in good adjustment?

A. Yes.

Q. Are you also assuming that the lens of those glasses has not rotated off axis?

A. I don't assume anything about it. If he is satisfied with the glasses, he has them duplicated. If he isn't, he isn't going to have them duplicated. If it's off axis and it's causing him no symptoms, he doesn't know it's off axis, he can have them duplicated and wear them and there is no harm done.

Q. Still that would not be the type of lens you would want to have him to wear, according to your prescription?

A. It would not be according to my prescription, no. What we aim to do in a refraction, I think that sometimes we get mixed up in technical things too much. The aim of a proper refraction is first of all to have the best vision that the glasses will give the patient, plus comfort. Now if the glasses are fitted improperly, and a number of times that [fol. 267] will be true, because the patient subjectively didn't give you the proper answers, or maybe the doctor was a little careless that morning, but if he gets the glasses and he sees well, and he has no discomfort, suppose that a mistake had been made somewhere, it is of no importance. You fit the patient with glasses to make him see the best you can, with comfort. Now technically whether you've got it on this axis or that axis is of absolutely no importance, and you find people wearing the screwiest type of glasses, that when you get through examining them, your reading and your interpretation of what they need is exactly different to what they have worn, but they have been quite comfortable and they have seen well with what they have had.

Now you have two choices. You can let them wear what they have, or you can give them a new pair of glasses, and very often we let them wear what they have had, if financial matters enter into it. You can't say that the eye is like a piston in a cyinder, you don't have to fit it to that tolerance.

Now we are after comfort and the best vision and that's all.

Mr. Daugherty: That's all, thank you.

Judge Murrah: Doctor, you understand the scope of our inquiry here is confined to refraction?

The Witness: Yes, I know, and a lot of my remarks [fol. 268] are based on that assumption.

Mr. Woods: Just one question.

Redirect examination.

By Mr. Woods:

Q. With respect to a lensometer, is it difficult to instruct a person of average intelligence as to how to properly use the lensometer?

A. No, it's a simple instrument to use with an intelligent individual. I have instructed many people in using it. It isn't a difficult instrument, if you have a proper instrument.

Q. And it is a precise optical instrument, isn't it?

A. Oh, yes.

Judge Murrah: You are excused.

(Witness withdraws.)

Judge Murrah: Court will be in recess until 2:00 o'clock.

(Whereupon the noon recess was taken, to reconvene at 2:00 p.m., with the same counsel present.)

[fol. 269] AFTERNOON SESSION

October 26, 1953

Judge Murrah: Proceed.

ALLEN D. HILL, called as a witness on behalf of the plaintiffs, being of lawful age and being first duly sworn, testified as follows:

Direct examination.

By Mr. Woods:

Q. Will you state your name, if you please?

A. Allen D. Hill.

Q. Where do you live, Mr. Hill?

A. 1819 Northwest 31st, Oklahoma City.

Q. What is your occupation, sir?

A. I am a dispensing optician.

Q. For how long have you been a dispensing optician?

A. Off and on for I should say about eighteen or nineteen years.

Q. Would you just very generally relate your experience in the field of ophthalmic optics?

A. I was employed by American Optical Company in 1934 as a dispensing optician. I was trained in that work, and from that point I went through various departments. They train in various phases of the ophthalmological department, which is the sale of and servicing of ophthalmic instruments.

[fol. 270] Q. Would you speak up just a little bit, please, Mr. Hill?

A. Yes. And then I was field representative for about eight years for them. By that I mean I was salesman, ophthalmic salesman for them. I was in their safety division, which is a division which has to do with industrial safety, ocular safety, and at one time I was assistant branch manager for them.

Q. In what territory?

A. In St. Joseph, Missouri.

Judge Murrah: For whom?

The Witness: American Optical Company.

By Mr. Woods:

Q. And were you a representative of American Optical Company in the State of Oklahoma?

A. Yes, sir.

Q. For a number of years?

A. Yes, sir.

Q. In that connection, did you have occasion to travel over the state and deal with ophthalmologists and optometrists and opticians?

A. Yes, I did.

Q. Mr. Hill, are you the holder of any certificate in opticianry?

A. Yes. I am a member of the National Guild of Opticians, and a Master in Ophthalmic Optics.

[fol. 271] Q. Now that Master in Ophthalmic Optics is issued by what organization?

A. The American Board of Opticianry.

Q. And you are also, I believe you said, a member of the Guild?

A. Yes, sir.

Q. Now what do you refer to by that Guild?

A. Well, it's an association of opticians throughout the country; it's a national organization.

Q. What is the correct name of that body?

A. The National——

Q. (Interposing) Is it the Guild of Prescription Opticians?

A. That's right, sir, the title is the National Guild of Prescription Opticians.

Q. From your experience in the field of ophthalmic optics, is it true that the visual care, eye care field, is divided into three main groups?

A. Yes, sir.

Q. The ophthalmologists, the optometrists, and the optician?

A. That's right.

Q. I will ask you to state, if you will, please, sir, for the Court the functions of the optician in that field.

A. Well, I think I can best explain it by giving the definition that the American Board of Opticianry gives of it, [fol. 272] quote, Opticianry is the art and science of optics as applied to the compounding, filling, and adapting of ophthalmic prescriptions, products and accessories. It is a skilled artisan and semi-professional vocation, devoted to serving the public through the optical assistance rendered to the public.

Judge Murrah: Repeat the last part; repeat the last part, just the last sentence, will you?

The Witness: It is a skilled artisan and semi-professional vocation, devoted to serving the public through the optical assistance rendered to the public.

By Mr. Woods:

Q. Now as an optician, as a dispensing optician, what in general are the duties you perform, just very generally?

A. I receive ophthalmic prescriptions from the ophthalmologists, and in very rare instances optometrists; do the technical work which involves measuring the distance between the pupils, commonly known as P. D., aiding in the selection of a frame, and of course in many cases it is a matter of styling with women, and some men are a little bit particular about what type of frame they wear; so actually it's a combination of technical work plus merchandising.

Q. And that is what is understood from your experience in the trade by the term "dispensing optician"?

A. Yes, sir.

[fol. 273] Q. Can you state what the trade understands the term "optical supplier" to mean?

A. Well, that would be an optical wholesaler, like American Optical Company, or Bausch & Lomb; one who would supply me with merchandise.

Q. Yes.

A. Either a manufacturer or a distributor of the manufacturer.

Judge Vaught: What character of merchandise now do you refer to?

The Witness: Well, lenses and frames.

Judge Vaught: Lenses and frames?

The Witness: Yes, sir.

Judge Vaught: The lenses are in the raw state until you fill a prescription?

The Witness: Well, in my particular mode of operation, they are not. They are in a finished form; what we do—that is, they are ground to the prescription, but in single vision lenses, as differentiated from bifocal—in single vision lenses we do our own cutting and edging operations, and putting them in the frame. Where bifocals are concerned, they are sent to us in a completely finished form except that they have not been inserted in the frame.

Judge Vaught: Then you determine which lens to use from the specification of the prescription?

[fol. 274] The Witness: Yes, sir.

By Mr. Woods:

Q. What if any other services, Mr. Hill, does the optical supplier render? You have mentioned that he sells you the

merchandise that you use, the lenses and the frames. In other words, does the optical supplier do any opticianry work?

A. No, not to my knowledge.

Q. Does the optical supplier do any inserting of lenses into frames, and then the selling of those frames to any segment in this total field of eye care?

A. I believe they do in the safety field only.

Q. Now I wish you would very briefly, but cover the different functions. You have mentioned that you take the doctor's prescription and you obtain the lenses which comply with that prescription. When you have gotten those lenses, in what general shape are they?

A. They are approximately 55 millimeters square.

Q. Yes, and you are speaking now of the finished lenses?

A. No, that is a finished lens, but an uncut lens.

Q. That's correct. Now what do you do with that finished but uncut lens in filling the doctor's prescription?

A. In the case of single vision lenses, we use that instrument, the lensometer.

Q. Yes.

[fol. 275] A. And first ascertain that it's according to prescription. Then we determine the optical center, which of course hinges upon pupillary distance.

Q. Yes.

A. And spot that, we spot the axis of the cylinder.

Q. Yes. Now when you say you spot the optical center and you spot the axis of the cylinder, what do you mean by that?

A. We mark, we actually mark; that instrument has a marking device for that purpose.

Q. And you make a mark, you make a mark for that on the lens, the lens shape, the lens form?

A. That's true.

Q. Then what do you do?

A. It's then put in a diamond cutting machine.

Judge Murrah: Who does that?

The Witness: Who does that?

Judge Murrah: Who does that particular operation?

The Witness: We do.

Judge Murrah: You do?

The Witness: Yes, sir. We have templates or patterns, which fit on this cutting machine, and determine the shape which the finished lens will have; also the cutter is calibrated for the various sizes. The lens is put on that cutting machine according to axis, it is lined up according to axis, and optical centers, placed on the cutting machine and [fol. 276] then cut with this diamond cutter. From that point it is taken, that template or pattern is removed from the cutting machine and placed on what we call an edging machine. In other words, after it comes from the cutter, it has rather sharp edges, it is just like a piece of glass that you would have cut for a window. It has a rather sharp edge. So it's then put, the pattern is then put on the edging machine, which is a large revolving grinding abrasive wheel, and from that point it's what we call edged to size. It is also calibrated for, it has calibration for the various sizes. We put it in this grinding machine and it is then finished, if it's a rimless frame, that's all we do to it, except drilling and of course checking it. If it's one that would go into the Judge's frame, like that, it has to have a bevel put on it. We put that on by hand.

By Mr. Woods:

Q. Now Mr. Hill, you mentioned the optical center.

Judge Murrah: May I —

Mr. Woods: Surely.

Judge Murrah: You have the equipment for and you do perform all of those functions that you just now enumerated?

The Witness: Yes, sir.

Judge Murrah: And that you say is partly within the scope of your calling?

[fol. 277] The Witness: Yes, sir.

Judge Murrah: Vocation.

The Witness: Yes, sir.

Judge Murrah: Proceed.

By Mr. Woods:

Q. You mentioned the optical center of the lens, in the uncut len. where approximately is the optical center?

A. Approximately in the center.

Q. You mean the geometric center?

A. The geometric center.

Q. Now I will ask you whether, if in filling these prescriptions it is ever necessary for you to vary the optical center from the geometrical center of the lens that is to be mounted in the frame.

A. Almost invariably.

Q. And what is the reason for that?

A. Because the average pair of glasses, if made precisely to geometrically center on the individual's pupils, would not be cosmetically acceptable or it might be very much too, it probably would be very much too small.

Q. And is the control of where the optical center will be in the finished lens a matter which you normally perform and control as a part of your function?

A. Yes.

Q. All right, now, after you have cut the lens to shape and [fol. 278] edged it, what next do you do?

A. It is then put in a frame.

Q. Yes.

A. Of the customer's choice, which may be, if it's a rimless, of course, a diamond drill is used for drilling holes so that it can be suspended in these, well, like the Judge's over there; if it's a plastic frame, of course it's a matter of putting a bevel on it and then inserting through a heating process in the plastic frame; or, if it's like Judge Vaught's, it's put in that frame merely by unscrewing a screw and then screwing the screw back in. It is then checked, of course, for stress and strain.

Q. Explain that, if you please.

A. We have a polarizing instrument which is so sensitive that if a person will touch his fingernail, push his fingernail against the edge of a lens, it will show on it, show an amount of stress; and of course we have overcome largely the difficulties that people used to have with maybe wearing a lens a day or so and having it crack, and then of course they would come back. Well, it was mounted, put in the frame too tightly. Where it is put in a metal frame or rimless frame, we invariably use this colomscope.

Q. By using that instrument, you can determine at what point there is no stress, undue stress on that lens?

A. That's right, whether it's safe.

[fol. 279] Q. Very well, sir. Now after you have mounted the lens in the frames, what is the next thing you do, Mr. Hill?

A. We of course straighten them, align them, get the lenses so that they are in plane with each other, and in alignment with the bridge; and as a rule we will align the temples, those ear pieces, so that they are parallel, and then of course we check on the lensometer to verify our work.

Q. To verify the work in what respect?

A. According to prescription.

Q. You mean the power of the lens?

A. That's right, the power of the lens, the axis, and the optical centers.

Q. After you have done all that, what do you do with respect to these glasses?

A. Then of course we call the customer.

Q. Yes, and what do you do when the customer comes in?

A. We go through various manipulations of adjusting the nose pieces and panoscoping the lenses, which is angling them properly so that the corneal distance at the top is the same as at the bottom, and adjusting them so that they are comfortable behind the ears. In other words, we make them comfortable, as well as place them properly before the eye.

Q. Yes. Now going back just a moment: How is the frame that you are going to use for a specific customer of yours determined?

[fol. 280] A. Well, that is, of course, a matter of choice with the customer, and of course they will take our advice if they have some peculiar situation that would not allow them to wear the type of frame they would want.

Q. In the conduct of your business, do you maintain a stock of frames?

A. Yes.

Q. Do those frames come in standard sizes and have sizes, we will say?

A. Yes, they do.

Q. And I suppose in different colors and different shapes?

A. That's correct.

Q. And when a patient comes in with the prescription to be filled, do you display those frames to that person?

A. That's true.

Q. And then within the limits you have defined, permit them to choose the frame they desire?

A. Yes, sir.

Q. That's the way the frame is selected?

A. That's right.

Q. Now what tools do you use in carrying out your business?

A. Well, may I show?

Q. Do you have some here you can show, just tell them, please.

A. Yes, sir. Of course, there are a lot more tools than these, but I won't burden the Court with them. This is [fol. 281] probably the most commonly used tool, which is a very simple pair of fine-nosed, snipe nosed pliers, as they are called, and this is a highly specialized plier which grasps the top of a rimless mounting, and this is one for lowering or raising the nose pads on the type of frame that has nose pads. This is for the alignment of the top bar of the so-called Numont mounting. This is an instrument we use where a person has a very high correction, say that he's had a cataract operation, and his crystal lens has been removed. The doctor, as Dr. Coston explained this morning, will write on his prescription the distance at which his instrument was set from the patient's cornea. Then we will use this instrument to determine how far the frame, or the finished lenses, or sample lenses, will set from the patient's eyes, and with those two figures the laboratory can grind compensations in the lenses which will give the person, give the patient the best possible vision.

Here is what is known as a lens measure, which is for determining the base curvature of a lens. Invariably when we duplicate a lens, we will use this to determine how the lens has been ground, on what curvature it's been ground, because were we to change, even though we might give a person the same power precisely that he had been wearing—if we changed the curvature of the lens, we might cause him, well, just wouldn't be a finished job in our opinion. We are that careful.

[fol. 282] Q. Would you show how you use that lens-meter on that lens?

A. Yes. Shall I go up there? This is just a little clock dial.

Judge Murrah: You will have to speak so the court reporter can hear you, because this must go in the record. It wouldn't be of any benefit.

The Witness: Yes, sure. Well, this lens happens to be a spherical, because the little clock doesn't, little hand doesn't vary, as I turn it around the different meridians of the lens, so this shows a plus 6 front, and that is a minus 6 inside, which means that there is no power in that lens whatever, because when you add plus 6 to minus 6, you get nothing algebraically, and that is the basis on which, of course, all lenses are ground, there is a combination of curvatures. Had that been a plus, we'll say a plus 7 on the outside and a minus 6 on the inside, it would have been a lens of plus 1 power. Anyhow, this is really more an instrument that we use for refining our work.

Judge Murrah: Testing?

The Witness: Yes, but more a refinement, because it's really not cogent to the power, particularly. Back in the old days, lots of people neutralized lenses this way. I can remember when this was used in place of the lensometer back in the old days, but now it's really just an adjunct to the refinement of duplication of lenses.

[fol. 283] By Mr. Woods:

Q. Now Mr. Hill, what tools do you use for determining the pupillary distance, that distance between the pupils?

A. Well, this is just a millimeter rule, which goes up to 15 centimeters, that is 150 millimeters, and that is the one ordinarily used, unless the individual has some peculiarity. Assume that one eye is set farther from the nose than the other. Then we use this type of thing (indicating); we place this on the patient's face.

Q. What is this called?

A. Pupilometer.

Q. Yes.

A. And we can, assuming that one eye is farther from the nose, we'll say the right side, we will decenter that farther

than we will this one. In other words, we will put the optical center according to what we find on this pupilometer.

Q. Is it correct to say then in determining the pupillary distance, the interpupillary distance, it's a matter of measurement, linear measurement?

A. Entirely.

Q. Now the lensometer has been mentioned during the evidence so far. Would you point out to the Court a lensometer?

A. Right here. (Indicating.)

[fol. 284] Q. Now for what is a lensometer used?

A. Lensometer is used for the determination of the power of an ophthalmic lens. When I say ophthalmic lens, of course I mean a lens which is worn in a pair of glasses. It will determine the spherical power, the cylindrical power, the axis at which the cylinder power exists, and also the optical center, as well as any prism which might be contained in the lens.

Q. Now just very generally would you describe to the Court how you determine by viewing this instrument what you see when you have determined the spherical power, you have reached the point where you have neutralized the lens?

A. Where there is a sphere involved, spherical lens, which is a prescription which contains no astigmatism at all, this instrument will show three lines in one direction, and one line at right angles to that, all of precisely the same intensity. This target, of course, is illuminated, a little light back here which I believe that's strip gold, that is the way that target is made, it's stripping off gold leaf, but in a cylindrical correction, this—it's a little bit difficult to explain to someone not familiar with it; but say that I have a plus 2 plus 50 at axis 90. That would be a rather common prescription.

Q. Now that would be a spherical lens?

A. No, that would be a cylindrical.

[fol. 285] Q. Cylindrical?

A. That's right, that's what's called a compound. When I would look into here I would see on this dial, I would see 90.

Q. Axis dial?

A. That's right, this is the axis dial. This is the power dial, and were I to neutralize this, I would first see on this calibration, in the plus area of the wheel, I would see a plus 50, and then I would go up to a plus two fifty.

Judge Murrah: Why?

The Witness: Well, because the difference between that would give you, would be the total power, and the difference between the spherical and the total power is the cylindrical power.

Judge Vaught: In other words, this instrument is for the purpose of determining the character of the lens that you use for any particular purpose?

The Witness: Yes, sir.

By Mr. Woods:

Q. In the instance there: You have Mr. Duvall's glasses. What do you determine the power of that left lens to be?

A. Plus 1.50.

Judge Vaught: All lawyers don't wear the same kind of glasses, do they?

The Witness: No, sir.

[fol. 286] Judge Wallace: Is the right one the same?

The Witness: No, it's a compound. It's different. It's a plus 1.50 plus 25 at axis 50.

By Mr. Woods:

Q. That means that is a combination of a spherical and a cylindrical lens there, cylindrical lens having an axis of 50 degrees?

A. Right.

Q. Is what you have done with respect to Mr. Duvall's glasses what is done by an optician when he checks the lens that is mounted in the glasses to see that it conforms to the prescription?

A. That is correct, except that you do spot the optical centers.

Q. Yes, sir.

A. To be sure that they are according to prescription.

Q. And what you have gone through with the lensometer

are precisely the same acts you would go through if you were duplicating a lens, either to make an extra pair of glasses or where you had a broken lens?

A. That's correct.

Q. Mr. Hill, have you in your experience taught people who purchased lensometers how to use them?

A. Many times.

Q. And whom, in general category, have you taught to [fol. 287] use lensometers?

A. Ophthalmologists, optometrists, opticians, and a number of fellows who were in the Army.

Q. In your opinion, from your instruction, is it a difficult instrument of which to teach the use?

A. Not at all. It's very simple.

Q. Would a person of average intelligence, how quickly do you think you could teach them to use a lensometer properly?

A. I should say in two to three hours.

Q. Of course, I suppose with continued use, a person becomes more proficient?

A. That's correct.

Judge Vaught: What do you do, Mr. Hill, when someone comes to your place of business and teils you that he has broken a lens?

The Witness: Well, of course, if he has bought his glasses from us, we merely go to our record, and if he wants us to, we make him a new lens; or if it's someone who is out of town, say from California, driving through to the East Coast, if there is enough of the lens so that we can determine the shape, where the axis is, and the center should be, we will duplicate it.

By Mr. Woods:

Q. And what will you use to determine the axis and the shape and the power of the lens in that duplication?

[fol. 288] A. Lensometer.

Q. And is that what is used by optometrists as well as the optician in that duplication?

A. Surely.

Q. The same instrument?

A. Surely.

Q. Now you were speaking of the size of the fragment——

Judge Vaught: (Interposing) Suppose that there is not enough of the glass left, the lens left so that you can tell. Then what do you do?

The Witness: Well, we just suggest that they get their eyes examined some place. It's all that we can do.

Judge Vaught: In other words, you never make a completed job except you have the prescription?

The Witness: Well, yes, sir, if we have enough of the lens to duplicate.

Judge Vaught: Aside from that you have to have the prescription?

The Witness: Aside from that you would have to have the prescription? I don't quite follow.

Judge Vaught: Well, before you make up a set of glasses you have to have a prescription?

The Witness: Oh, yes, sir.

Judge Vaught: You wouldn't turn out a pair of glasses, except they were made by filling a prescription?

[fol. 289] The Witness: Never would, except in the case of a duplication, of course, and we might consider that a prescription in a way.

Judge Vaught: In a duplication you would, if you have the prescription, if you made the glasses originally, you would have the prescription on file?

The Witness: Yes, sir.

Judge Vaught: And if there was enough of the glass left and you didn't have the prescription, then you would make it from the glass?

The Witness: Yes, sir; or one other thing we might do: If it were a local doctor and we didn't have a file on the particular customer, we might call the doctor and get the original from him; wouldn't be necessary but we might do that.

By Mr. Woods:

Q. Do you have with you, Mr. Hill, any sample of the type prescription you receive?

A. Yes.
Q. May I see those, if you please?
A. Surely.

(Plaintiffs' Exhibit 18, being prescription, Mrs. Warren Towe, 1/10/52, was marked for identification;

(Plaintiffs' Exhibit 19, being prescription, L. J. Martin, Wichita, Kansas, was marked for identification;

(Plaintiffs' Exhibit 20, being prescription, Lloyd J. Martin, Sept. 12, 1951, was marked for identification.)

[fol. 290] By Mr. Woods:

Q. Mr. Hill, I hand you first what has been marked as Plaintiffs' Number 18 for identification, and ask you to state what that is.
A. Well, it's an ophthalmic prescription for a pair of glasses.
Q. For whom is that made, incidentally?
A. Mrs. Warren Towe.
Q. Who is he?
A. "She", you mean?
Q. Who is she?
A. Mrs. Warren Towe.
Q. Yes. I notice that they have both pencil and pen and ink figures in writing on that. Whose is the pen and ink writing, if you can tell?
A. That's the prescribing doctor's writing.
Q. And what appears on there in pencil is whose writing?
A. That is the dispenser's writing.
Q. I show you what's been marked Plaintiffs' Exhibit 20 for identification; is that also the prescription of an ophthalmologist?
A. Yes.
Q. And is the pen and ink on there the doctor's writing?
A. Yes, sir, there is the transcript. It was so small we had to transcribe our directions on this. (Indicating)
[fol. 291] Q. You are directing my attention to Plaintiffs' Exhibit 19?
A. Yes.

Q. That is what—your record that you prepared in your shop of this prescription?

A. Yes.

Q. That's all in the handwriting of someone in your place of business?

A. That's right.

Q. And that goes along with Exhibit 20?

A. Yes.

Mr. Woods: Plaintiffs offer in evidence Exhibits 19—18, 19, and 20.

(There being no objection, Plaintiffs' Exhibits 18, 19, and 20 were received in evidence.)

By Mr. Woods:

Q. Do you have Mr. Duvall's prescription with you?

A. I did have it. I don't know what happened to it. No, here it is.

(Plaintiffs' Exhibit 21, being prescription, Mr. Duke Duvall, 8/18/51, was marked for identification.)

Q. I hand you what is marked Plaintiffs' Exhibit 21 and ask you whether or not that is Mr. Duvall's prescription for eyeglasses.

A. That's correct.

Q. Issued by whom?

[fol. 292] A. Dr. Coston.

Q. What is the date on it?

A. 8/18/51.

Mr. Woods: Plaintiffs offer in evidence Exhibit 21.

Judge Murrah: Any objection? Let it be admitted.

(Plaintiffs' Exhibit 21 was received in evidence.)

By Mr. Woods:

Q. Now Mr. Hill, I would ask you to very quickly demonstrate, if you will, what is involved in fitting and adjusting frames to the face.

A. May I use——

Q. (Interposing) Use Mr. Phillips.

A. Use Mr. Phillips as the subject?

A. Yes.

A. This is just an ordinary pair of rimless glasses.

Q. You have placed the glasses on Mr. Phillips' nose and the ear pieces over his ears?

A. That's right. It happens that sample is a little bit small for him. I find a little difference here, too, in the way, in the angle of the right side of his nose, as compared to the angle of this particular pad, so I will straighten that out, make it flat against his nose, so that the edge won't bear down too heavily.

Q. Now in making that adjustment, you are using what instrument, Mr. Hill?

[fol. 293] A. Just an ordinary pair of snipe nose pliers.

Q. Pliers, and you are bending the wire support to that pad?

A. That's correct.

Q. Now as a result of that testing of the glasses on Mr. Phillips' face, what do you find?

A. That they were setting a little bit too low, they were resting on his cheek, a little too much on his nose.

Q. You mean the bottom part of the lens was resting on his cheek?

A. Nasal edge of the lenses, so I'm going to raise them.

Q. And how are you raising those lenses, by what adjustment?

A. By bringing the pads together very little.

Q. Yes.

A. That has the effect of raising it on the face, and in some cases, of course, instead of bringing them together, the guard is lowered, or the pad is lowered, so that also will raise the glasses. They are also binding in here (indicating). Therefore I am going to widen these temples or ear pieces.

Q. You pointed to Mr. Phillips' right temple and to the temple piece of the eyeglass?

A. Both sides of his head. In other words, his head is a little bit too wide for the glasses at the moment.

Q. And how do you accomplish that adjustment?

[fol. 294] A. By the simple process of bending these pieces out.

Q. The temple pieces you are referring to?

A. Temple pieces out, and molding a slight curve in there.

Q. With your fingers?

A. Yes.

Mr. Daugherty: May it please the Court, the Court may find this testimony of interest, may want to hear some of this or see some of this. We feel that it is not pertinent to the issues in this lawsuit, because there isn't any question that the dispensing optician can dispense, and can fit and adjust glasses if he has the prescription for them; and I don't wish to object to it if the Court is interested in seeing this, but I do wish to point out that in our opinion it is not material to the issues of this lawsuit.

Judge Murrah: The Court understands that from the pretrial conference, that the function of an optician is that of a craftsman and it involves the skill of a craftsman. Now it would seem that would be sufficient, that that would serve the purposes of this lawsuit. Of course if you have something else in mind, why the Court would be glad to hear you. This is interesting, and the Court has no disposition to curtail your proof, but we don't understand that there is any, the Court doesn't understand that there is any dispute concerning the function of an optician, as distinguished from that of an optometrist or an ophthalmologist.

[fol. 295] Mr. Woods: Well, your Honor please, it is my understanding that the State and these defendants are contending that just what Mr. Hill was doing constitutes the practice of optometry.

Judge Murrah: The Court doesn't so understand, but it may be, and if that is true it might be that it's pertinent, I suppose, and material to show that what is claimed to be the work, the practice of a profession, is nothing more than the application of the skill of a craftsman.

Mr. Woods: That is the reason we are offering it, your Honor please.

Judge Murrah: I don't know what the State's position is about that. I understood that that was made, I don't know whether it was agreed upon, but discussed in any event.

Mr. Daugherty: That may or may not be the practice of optometry, but the dispensing optician is permitted to do it under this law, provided he has a prescriptive authority to proceed with the patient.

Judge Murrah: That's true.

Mr. Woods: If your Honors please, I am basing it partly upon the answer of the defendant, particularly paragraphs 5 and paragraph 8; and paragraph 8 is in answer to our paragraph 11 in our complaint, in which we allege that the plaintiff is doing these things that have been demonstrated by Mr. Hill, among others, and the defendants have [fol. 296] answered and said that not only is that a violation of House Bill Number 953, but also violative of the provisions of Chapter 11 and Chapter 13 of Title 59 of Oklahoma Statutes, those two being, 11 being the optometry statute and 13 being the medical practitioner statute; so they have alleged in their answer that the doing of these things constitute the practice of optometry, or the practice of medicine, as I understand it, and that is the purpose for which I am offering this line of evidence.

Judge Murrah: Proceed.

The Witness: I think he is about finished. One more thing I am going to do is to angle or panoscope the lenses properly so that the top of the lens and the bottom of the lens will be equidistant from the pupil when the glasses are put on the face.

By Mr. Woods:

Q. And you use for that adjustment what tool?

A. It's another pair of, specialized pair of pliers called the Numont plier.

Q. Yes. You have completed the adjustment of those glasses?

A. Yes.

Q. Thank you, sir. Will you resume the stand, if you please.

Judge Vaught: How long has just what you have been doing been done by opticians?

[fol. 297] The Witness: Well, I imagine probably since the first pair of glasses were invented or discovered. I believe since the 14th Century, as I understand my history.

By Mr. Woods:

Q. Have opticians been doing these acts as long as you have been, for the twenty years you have been in the field?

A. Oh, positively.

Mr. Woods: I don't mean to interrupt. Did your Honor have another question?

By Mr. Woods:

Q. Mr. Hill, in connection with your work in this field, I believe you testified that you have had occasion to travel over the state and to deal with optometrists and ophthalmologists and opticians?

A. (Nods affirmatively.)

Q. Based upon that experience, do you have any knowledge as to how optometrists practice in the State of Oklahoma with respect to their prescriptions, and particularly do the optometrists in Oklahoma permit a person whose eyes they have refracted to take the prescription out and have it filled by an optician of that patient's own choosing, to your knowledge?

A. To my knowledge, I would say they do not.

Q. In the time that you have practiced as a dispensing optician, how many optometrists' prescriptions do you recall that you have filled?

[fol. 298] A. In the three years that I have, three and one-half years I have been in Oklahoma as a dispensing optician, I would say not more than three.

Q. Is it true then that the rest of the prescriptions you have filled come from ophthalmologists?

A. That's right.

Q. Do you have a knowledge as to how optometrists in this state charge for their examination and for their glasses?

A. I would say that generally speaking a pair of glasses comparable to those that I just adjusted would probably cost the individual about $30.00.

Q. What kind of glasses are those?

A. Single vision lenses and a Numont mounting.

Q. Is it the practice of optometrists in the State of Oklahoma to your knowledge to make just one charge?

A. Yes, it is.

Q. Which covers the examination and the glasses?

A. (Nods affirmatively.)

Judge Murrah: The $30.00 is the charge, an ordinary charge made by an optometrist?

The Witness: Yes, sir.

Judge Murrah: Thank you.

By Mr. Woods:

Q. Can you tell me what the average optometrist in this community would charge where he made a refraction but [fol. 299] did not prescribe glasses?

A. I would imagine about $5.00.

Q. Can you tell me approximately the cost of the materials in these glasses, that is a Namont frame and a single vision lenses?

A. I should say about $7.50, $8.00.

Q. Do opticians here to your knowledge make any charge for adjustment of glasses?

A. No.

Q. Do you adjust glasses for persons even though they may not be customers of yours whenever they come in?

A. Yes, we do.

Q. And you make no charge for that?

A. That is correct.

Q. Can you tell me approximately what percentage of the optometrists here in Oklahoma City are located in ground floor locations?

A. I would say——

Mr. Daugherty: (Interposing) I object to that, incompetent, irrelevant and immaterial, has no bearing on the issues in this case.

Judge Murrah: Overruled.

By Mr. Woods:

Q. Did you answer that, Mr. Hill?

A. I would say over half of them.

[fol. 300] Q. And in what type of locations are their ground floor offices?

A. Downtown, central business area locations, choice locations from a commercial standpoint, I'd say.

Q. How about out in the suburban retail shopping areas, are there any optometrists out there in those areas?

A. Yes, some have gone out there.

Mr. Woods: That's all. You may inquire.

Cross-examination.

By Mr. Daugherty:

Q. Mr. Hill, how long have you been a dispensing optician on your own?

A. You mean how long have I owned my own business?

Q. Yes.

A. Since the first day of 1950.

Q. Since the year of 1950?

A. Yes, sir, since the first day.

Q. Prior to that were you with the American Optical Company?

A. Yes, sir.

Q. Was your primary function with American Optical Company then that of a salesman?

A. In the latter years, yes, sir, the past——

Q. Go ahead. I'm sorry, I thought you had finished.

A. In the, I would say the past seven years, yes.

Q. Were you ever in their optical grinding department? [fol. 301] A. No.

Q. Do you know how to grind lenses?

A. No.

Q. Do you grind your own lenses in your place of business?

A. No.

Q. Do you have a lensometer in your place of business?

A. Yes, sir.

Q. How did you happen to become a dispensing optician?

A. Back during the depression, American Optical Company was in need of trainees as dispensing opticians, and I went to work for them as a trainee and they trained me in that function.

Q. Now if you receive a prescription for glasses from an ophthalmologist or optometrist, do you send that prescrip-

tion on to a supply house, do they do the grinding of the lens?

A. Yes.

Q. Do you send the same prescription or do you prepare one of your own?

A. No, we usually telephone our orders.

Q. You retain the original prescription?

A. Yes.

Q. Then do they send back the lens that have been ground according to the prescription?

A. That's correct, with a copy of the prescription.

Q. Now I believe you testified that if somebody comes in [fol. 302] with a pair of glasses and wants them duplicated, that if you have the prescription that you will duplicate from the prescription; is that right?

A. That's true.

Q. Do you prefer to duplicate from the prescription over and above duplicating from the glasses themselves?

A. Not necessarily. The only reason we do, it saves time.

Judge Murrah: Will you repeat that question, please?

By Mr. Daugherty:

Q. Will he prefer to duplicate from the medical prescription rather than to duplicate from the glasses themselves.

Judge Murrah: What is the answer?

The Witness: We do for the simple reason that it saves the time of neutralization.

Judge Murrah: You do what?

The Witness: We refer to the original, and we like to keep all of the material in one file, as the girl will always go to the file and pull out the original prescription of the customer so that we won't have several different files on one individual. That's the only reason we do it.

Judge Murrah: Very well.

By Mr. Daugherty:

Q. Isn't it true that the doctor's prescription puts down exactly how he wants the lenses ground and where he wants [fol. 303] the optical center and where he wants the axis to be?

A. No, very rarely the optical center; he specifies the power.

Q. It will give the optical center, will it?

A. No.

Q. You do have the optical center in a new prescription, do you not?

A. Well, certainly.

Q. My point is that the doctor's prescription does give you the strength of the lens, he gives you that exactly, is that right?

A. That's right.

Q. He gives information about the optical center and perhaps the axis?

A. Uh huh, occasionally about the optical center.

Q. That's in accordance with his examination, is that right?

A. Yes.

Q. Does the grinding laboratory attempt to follow that prescription exactly?

A. Certainly. If they don't, they get them back.

Q. Is there some acceptable tolerance, though, from the exact medical prescription that is permissible?

A. Very little; very little.

Q. All right. Now if the pair of glasses have been ground according to the prescription, and there is a tolerance [fol. 304] therein that they do not exactly comply with the doctor's prescription, and you then attempt to duplicate those glasses by the glasses themselves on the lensometer, isn't it correct that you do not get the doctor's prescription by the lensometer, but rather you get the prescription as to how the grinder of the lenses finished that product from the doctor's prescription?

A. Well, that would be true, yes.

Q. Now Mr. Hill, an unskilled person cannot operate this machine, could they?

A. Well, with a little training, I should say so.

Q. Could I determine the strength of my glasses from having merely used one of these, looked in one of them?

A. No, not immediately, but you could.

Q. Do operators of this machine get rusty from time to time if they lay off?

A. I shouldn't think so.

Q. Do optical laboratories sometimes have two of these machines, two operators who check each other when they do that work in the supply house?

A. That I wouldn't know.

Q. Well, you were with American Optical, didn't they do that?

A. Well, one machine is ordinarily used for laying out the lens.

[fol. 305] Q. Don't they frequently use two machines, two operators, to try to get accuracy in the supply houses?

A. Well, I wouldn't say so.

Q. Your testimony is that they don't in American Optical?

A. No, I don't think so. Just like I told you, in laying out the lens, the lens would be neutralized by the lensometer. It would be spotted for optical center and axis, and if there were anything wrong with it at that time it should be caught. Then, of course, after the lens is completely fabricated, it would also be checked so that there would be two checks on it.

Q. Is there some element of human manipulation in this machine in order to read it properly?

A. Very little.

Q. But there is some human element in it?

A. Well, I would say very little.

Q. But there is some; what about the machine, does it get out of adjustment occasionally?

A. Very, very rarely. I can't remember any instance in all of my experience where one got out, unless perhaps the bearings wore on it or something of that type, something mechanically wrong with it.

Q. Isn't it frequently the case that some of the practitioners buy one of these machines every couple of years?

A. They could, but I see no reason for it.

[fol. 306] Q. Don't they do it, some of them?

A. I wouldn't know.

Q. In other words, can this machine wear out, isn't it subject to maladjustment?

A. I would say very little.

Q. Now if I have a pair of glasses and the lens is rotated in my glasses away from the prescription that the doctor wanted me to have, and you put my glasses in this lens-

ometer, would you get the correct axis or would you get the axis to which my glasses have rotated?

A. Say that again.

Q. If the glasses in my frame have rotated off axis, say ten or fifteen degrees from that prescribed by the doctor and you attempt to duplicate the glasses with the lensometer, will not your axis reading be the rotated reading and not that prescribed by the doctor?

A. Well, that's correct. In other words, the patient would wear the same thing after he went out that he came in with.

Q. Yes, sir, but that may not be the doctor's prescription, might it?

A. Well, no.

Q. If you had the doctor's prescription and you followed his prescription duplicating, would you not from the supply house then get glasses in accordance with the doctor's pre- [fol. 307] scription, or with an acceptable tolerance?

A. (Nods affirmatively.)

Judge Murrah: What was the answer?

The Witness: Yes.

By Mr. Daugherty:

Q. Now if I should have these glasses duplicated two or three times with an acceptable tolerance each time, and the grinding laboratory went to the extreme of the acceptable tolerance in the same direction, might I end up with a pair of glasses that might be as many as ten or fifteen degrees off axis?

A. That's possible, but I think we'd hear from the person whose lenses we duplicated.

Judge Vaught: How is that material? Wouldn't that be true if it was by an optometrist or an ophthalmologist or anybody else?

Mr. Daugherty: Yes, it would, your Honor. My point, sir, is this: That if they duplicate from the doctor's prescription they duplicate from his exact examination findings, whereas if they duplicate from the glasses, the glasses can have changed condition, the axis can have moved, or something of that kind, to where they, when they duplicate they are not following——

Judge Vaught: (Interposing) You are assuming that if they duplicated the glasses from the glasses, that it wouldn't [fol. 308] be a duplicate?

Mr. Daugherty: It wouldn't be a duplicate of the doctor's prescription.

Judge Vaught: It would be exactly like the first set, wouldn't it?

Mr. Daugherty: No, sir, because if the glasses changed from a prescription, then they duplicated the glasses, it would not be the prescription.

Judge Vaught: You are assuming that the glasses didn't follow the prescription?

Mr. Daugherty: Either that or a case where the lens may rotate in the frame, your Honor, to where it would be off axis several degrees, and duplicated would be duplicated off axis, whereas if the duplication was made from the doctor's prescription, they would go back to the original proper axis which he wanted the glasses to be furnished the patient. My point is that in some instances the patient by a duplication from glasses will not receive the best possible visual care, but instead will receive glasses that do not comply with the doctor's prescription, whereas if these suppliers were required to follow the doctor's prescription, they would get what he ordered.

By Mr. Daugherty:

Q. Now I believe you testified a few moments ago about Mr. Duvall's glasses here; on the right eye, I believe, you [fol. 309] gave him plus 1.50 and plus 25 with axis of 50.

A. I believe so.

Q. How does it happen that Plaintiffs' Exhibit 21, which is the doctor's prescription, shows the axis of 45?

A. Well, they must have got it out five degrees off.

Q. Either that or you missed it five degrees in your reading?

A. One or the other.

Q. Then if you prescribed—duplicated a set of glasses for Mr. Duvall, your supply house on your prescription, instead of getting glasses Dr. Coston ordered for him, 45 degree axis, you would furnish him glasses with a 50 degree axis?

A. Well, I imagine that was within Dr. Coston's tolerance.

Q. Well, do you know that to be a fact?

A. Well, I imagine Mr. Duvall took them out there.

Q. The point is you missed his axis five degrees, didn't you, according to the prescription?

A. It's possible.

Q. Could you have missed it ten degrees just as well?

A. No, I'm sure we can't.

Q. If you sent this prescription to the supply house, the supply house would have determined it to be a 45 degree axis, would it not?

A. They should have.

[fol. 310] Q. And that's what Dr. Coston wanted, whereas on your prescription it would have gone to the supply house with the axis 50, is that right?

Judge Vaught: Did I understand that the prescription didn't go to the supply house?

The Witness: I doubt if it did. I imagine the secretary in our own laboratory—however, that's only a 25 cylinder, which the tolerance on that I think is admitted to be about ten degrees.

Judge Murrah: Proceed.

By Mr. Daugherty:

Q. Now isn't it true that some prescriptions from ophthalmologists in post-cataract cases or some cases of that kind might give you the distance that he wants the glasses to rest in front of the eyes?

A. Yes, sir.

Q. Might they give you an angle in and an angle out that they want?

A. Very rarely that. I can't recall . angle in or angle out.

Q. Sometimes they do that, do they not?

A. No, they might specify a corneal distance at which the refraction is done.

Q. Now if I had a pair of glasses and the doctor prescribed that they should rest at a precise distance in front [fol. 311] of my eyes, and I ask you to duplicate those glasses, and then you would fit those glasses back on my

face, would you know the exact distance they should rest before my eyes?

A. No.

Q. Now I believe you have already testified about the fragments.

A. Fragments?

Q. Fragments, yes, sir. If I should bring in to you a broken lens without the frame, could you tell the axis of that lens?

A. If we knew the contour of the lens, surely.

Q. If you didn't have enough to where you could tell that contour, would you know the correct axis?

A. No, we would not.

Q. Would you know the correct optical center?

A. No.

Q. If you undertook to duplicate that lens for me without a prescription, might I end up with ill fitting glasses, or glasses at best the result of a guess?

A. Certainly.

Judge Vaught: Would you attempt to reproduce a lens with that information?

The Witness: Certainly not.

Mr. Daugherty: That's all, thank you.

[fol. 312] Redirect examination.

By Mr. Woods:

Q. Just one or two questions: First, Mr. Daugherty asked you something about the optical center of a lens, and I gathered from his question that he was asking you if that was included in the doctor's prescription. Now is or is not the optical center written in the doctor's prescription?

A. Well, no, of course not, it isn't. That would indicate the pupillary distance. The optical center is contained in the finished lens.

Q. Yes.

A. Of course.

Q. And you correlate your measurement of the pupillary distance and that optical center in performing your function, is that not true?

A. That is true.

Q. Mr. Daugherty also gave you a question about a lens having rotated in the frame so that the axis, where the cylinder might be a little bit off; have you ever encountered any such case in your practice?

A. Yes, we have.

Q. How can it rotate in the frame?

A. Very, very rarely in a modern frame.

Q. Yes.

A. Back in the old days when lenses were round, of course [fol. 313] there was lots of danger of that. Where the lenses are angular there is very, very little likelihood of their rotating.

Q. Yes, sir. Now the prescription ground in the lens itself cannot change from day to day, can it?

A. No.

Q. And if a man came in to you with a pair of glasses and asked you to duplicate them, and they weren't causing any discomfort, the glasses you would duplicate, providing they complied with what he had, would give him just the same service he had before, would they not?

A. Yes, sir.

Mr. Daugherty: Object to the question as being leading and suggestive.

Judge Murrah: Yes, it is.

By Mr. Woods:

Q. Mr. Hill, in the prescription you receive from doctors, is there any data regarding the fitting, adjusting and adapting to the face of lenses?

A. No.

Judge Murrah: Beg pardon, repeat that.

Mr. Woods: Yes, sir, you Honor.

By Mr. Woods:

Q. In the prescriptions that you receive from doctors, ophthalmologists, is there any data or instruction to you as [fol. 314] to fitting, adjusting, adapting the frames to the face of the person?

A. There is not.

Q. In your practice, that is left up to you by your ophthalmologist?

A. That is correct.

Q. To your knowledge is it practicable or can such instructions be reduced to writing?

A. No, they could not be.

Q. Can you tell the Court, based upon your experience, approximately what percentage of glasses in the State of Oklahoma are dispensed by optometrists?

A. I would say about——

Mr. Daugherty: (Interposing) I object to the question unless the witness gives us some background on which he can——

Judge Vaught: (Interposing) If he knows he can answer.

The Witness: Well, I have read figures, surveys—about 70%, I would say.

Mr. Daugherty: Object to that, being hearsay evidence, if he doesn't know.

Judge Vaught: Overruled.

Judge Murrah: Be admitted.

The Witness: I read it in an optometric publication.

[fol. 315] Judge Murrah: Do you wish to cross examine him on the point, wish to cross examine the witness on that point?

Mr. Daugherty: No, sir.

Judge Murrah: Mr. Witness, assuming that the legal effect to the law now challenged is to prohibit you from fitting, ...justing, or adapting or replacing eyeglasses, except on the authority of and under prescription of a licensed physician or optometrist, what effect, what impact, what effect will that have on your business; what will it and what way will it affect your business? That's what the Court is interested in.

The Witness: It would be highly detrimental, inasmuch as it would make it——

Judge Murrah: (Interposing) No, don't just discuss it as detrimental.

The Witness: It would make it so very inconvenient for the public to go through all of this rigamarole of getting a prescription that the chances are that the people would be shunted into other optical——

Judge Murrah: Well, no, I want you to tell us what it will prevent you from doing that you are now doing. In

other words, assuming that the law has the effect that I have just enumerated, in what way will that change your, affect your business?

[fol. 316] The Witness: Well, of course, the great majority of the glasses are fitted by optometrists.

Judge Murrah: Yes.

The Witness: And of course, we are on a ground floor location, where it's very handy for the public, and we get a lot of business from people who see our place of business, naturally. In other words, if we were not able to duplicate lenses, for instance——

Judge Murrah: (Interposing) Now that's what I want to know, if one thing—you say it would prevent you, prohibit you from duplicating lenses?

The Witness: Not only would it keep us from selling a lens but also the frame, which is of course a good part of our business. We have only two things to sell, lenses and frames.

Judge Murrah: Then in what other way, specifically, if you can just tell us what way your business would be affected. I believe you stated a moment ago and also Dr. Coston, that you are now engaged in filling prescriptions of ophthalmologists, ophthal——

The Witness: Ophthalmic.

Judge Murrah: Ophthalmic prescriptions.

The Witness: Yes, sir.

Judge Murrah: And that in filling those you do so on the authority of prescriptive authority only?

[fol. 317] The Witness: Yes, sir.

Judge Murrah: You don't profess to do anything else?

The Witness: We don't want to do anything else.

Judge Murrah: Don't want to do anything else. Now the effect of this law as I understand it would prevent you from replacing those lenses without another prescription.

The Witness: That's true.

Judge Murrah: And you say that by doing so it deprives you of the right to replace a lens, which also might deprive you of a sale?

The Witness: That's correct.

Judge Murrah: Of a frame.

The Witness: Uh huh.

Judge Murrah: Now then, as I understand it, you say that would have the effect of diverting those replacements into another field?

The Witness: I believe it would.

Judge Murrah: Away from you.

The Witness: Uh huh.

Judge Murrah: Now is that primarily the detrimental effect of which you speak?

The Witness: Yes, I would say so.

Judge Murrah: Are there any others that you think of? [fol. 318] The Witness: No, but I think that's bad enough.

Judge Murrah: That's all right; I didn't mean to minimize that at all. Now if it also forbids you or anyone else, I suppose, to advertise under certain conditions——

The Witness: (Interposing) Yes, sir.

Judge Murrah: How would that affect you?

The Witness: Well, we, that wouldn't affect us too greatly. We are not too much interested in advertising.

Judge Murrah: You don't object to a regulation of that kind, do you? I didn't mean to put it like that. Do you object? That's what I mean.

The Witness: Well, I believe that certainly if a person has an expensive ground floor location he should be able to display frames in the window.

Judge Murrah: This law does, as you understand it, have the effect of preventing that?

The Witness: Oh, positively.

Judge Murrah: Yes.

The Witness: And I believe that we should be able to do our telephone directory advertising, which is not blatant advertising. It is all, most all of the advertising that would be done by most of us would be authorized by the Guild, and they have a very ethical approach to advertising.

Judge Murrah: What about your kick-backs? As I understand, there is a provision of the law that would forbid [fol. 319] you to kick-back to the ophthalmologist; I use the word "kick-back", I suppose there's——

The Witness: Rebate, kick-back. Well, of course, that thing was settled a long time ago. The Federal Government took care of that. Consent decree was signed back in the fall of 1951.

Judge Murrah: You don't object?

The Witness: Oh, certainly not.

Judge Murrah: Then what we are litigating about here is the question, is your right primarily to replace lenses and the effect that that has.

The Witness: Yes, sir. Of course I think that is our right.

Judge Murrah: Within the boundaries that you have stated of advertising.

The Witness: Yes, sir.

Judge Vaught: Maybe I misunderstood you, Mr. Daugherty Do I understand that it is the contention of the State that an optician has no authority under this law to fit the glasses and do what he did here in the court room as he demonstrated, adjust glasses and fit them to the patient's eyes, unless he has a prescription, unless it's specified in the prescription?

Mr. Daughterty: No, sir, we do not contend that the prescription need specify the fitting data, you Honor. [fol. 320] We do not contend that. We contend that before an optician can have the lenses ground, that he must have a prescription, and then when they come back to him, or else he grinds them himself which is not the case here, then he can fit that to the face. Now some prescriptions may contain fitting data, such as the distance before the eyes or angle in or other fitting data, bridgework and the pupillary distance.

Judge Vaught: According to the petition now and to the answer, they plead (reading) Plaintiffs have always rendered and are now rendering such service as the repair of broken eyeglasses and frames, the duplication of broken eyeglass lenses, the duplication of eyeglasses and the lenses contained therein, placing and replacing lenses in the frame and fitting, adjusting and adapting and applying to the face lenses, frames, prisms and other optical appliances and other similar services.

Now then, in your answer—defendants admit that material allegations of fact set forth in paragraph 11, but allege that the acts which Lee Optical of Oklahoma and Ellis Carp, Douglas Optical Company, as set forth in said paragraph, violate the provisions of House Bill Number 663.

Is it your contention that Mr. Hill here, for instance, has

no power under that law to fit these glasses, adjust them to the face of the patient?

Mr. Daugherty: Your Honor, I think I will have to answer [fol. 321] that this way: That before an optician should undertake to furnish lenses to a person, he should have the doctor's prescription. If he has the doctor's prescription, it is then filed and then he has the permanent right to fit and adapt and adjust the glasses to the face. That doesn't have to be in the prescription unless certain features are required. I don't know that I am answering your Honor's question, but it is our contention——

Judge Vaught: (Interposing) Assuming now there is a prescription, he has a prescription from John Jones, and he selects a pair of glasses, that is frames he has the lenses fitted according to the prescription; now is it your contention that he hasn't the right to put them on——

Mr. Daugherty: (Interposing) No, sir.

Judge Vaught: Your pleadings are different.

Mr. Daugherty: Well, the pleadings will be changed if it says that, your Honor, but we certainly do not.

Judge Vaught: I think it's very material.

Mr. Daugherty: We certainly do not contend that he is not entitled to fit and adapt and adjust under the circumstances you outline.

Mr. Woods: Of course, if your Honors please, that makes quite a difference in this lawsuit in their position. As we understood their pleadings, they were saying that the acts we have discussed that are involved in this Act, the [fol. 322] fitting, applying, adjusting to the face, duplication of lenses, replacement, all of those constitute the practice of optometry, based upon their specific positive allegation in paragraphs 5 and 8 of their answer.

Now as I understand Mr. Daugherty, he says that that isn't what they are contending or what the law means.

Judge Murrah: That is the question that came up earlier this morning in the proceedings, that is this morning; I think we should settle the pleadings on that, and the issues raised by the pleading, that is, may the optician when he has a prescription from an ophthalmologist or optometrist fill that prescription by fitting, adjusting and adapting to the face, as the mechanical—it's obviously a mechanical

function. It's a function that certainly no one could arrogate to a profession.

Judge Vaught: I think you ought to clear that now, so we'll know what we are trying.

Mr. Duvall: If the prescription simply provides for the lens and nothing more, it gives no directions as to fitting, gives no directions as to adjusting, gives no directions as to the type of frame or anything else, just the lens power; then under this statute under our pleadings and their answer, then that is prohibited by this bill. He can't do anything but get the lens.

Mr. Daugherty: That has never been our contention. [fol. 323] That is not our contention.

Judge Murrah: The optician says he does nothing except in accordance with his prescription, except to replace the lens.

Judge Vaught: And adjust.

Judge Murrah: I know, of course; you mean if the prescription doesn't prescribe the pupillary distance from the cornea, and matters of that kind, which is rare, the type of frame, then he is free to exercise his own skill and his own judgment?

Mr. Woods: That's right.

Judge Vaught: Defendant agrees to that?

Mr. Daugherty: That's entirely correct.

Judge Murrah: And of course the Court has in mind what their witness this morning said, and I believe the testimony was that only in rare instances where you had, he didn't use the word, but a deformity of the face or an unusual situation of the features which required special treatment that would of course be in a prescription, and I assume that the optician would follow the prescription in that respect, but if he didn't have a prescription he wouldn't be dealing with the question, isn't that right?

Mr. Daugherty: That's right.

Judge Murrah: An optician wouldn't be dealing with it, wouldn't have the problem before him if he didn't have a [fol. 324] prescription for it, because he never sees the patient in the first instance unless he does have a prescription; and I suppose that if he was refilling it, replacing it, I understand this witness to say he would either have the pre-

scription on file or he would take the power, take it from the lensometer. I suppose the lensometer would give that data?

Mr. Woods: I am not clear what data your Honor refers to.

Judge Murrah: Would it give the unusual situation about the pupillary distance, and also the axis, that difference in the axis that Mr. Duvall had—a compound on one side and a sphere on the other?

Mr. Woods: To answer your Honor's question, the lensometer will give the power of the lens. Of course it can't give the interpupillary distance because that can only be determined by measuring the eyes.

Judge Murrah: Very well.

Mr. Woods: It also will give you the axis, providing that the lens is either in the frame the way it was mounted, which of course determines and fixes that axis with relation to that frame. It can then determine it; or if you put the lens blank in the same position in the frame, then it gives the axis, and that is where it comes in, these fragments. If you have a small fragment you can't tell how it was in the frame, and if there is a cylinder involved, which is only, as I under-[fol. 325] stand it, used in case of astigmatism, the fragment would be too small, you couldn't tell just what position it was, you could'n't get the axis.

But now with respect to their position, if your Honors please, I think that if that is their position, it is not what they have pleaded, and I think that then their answer should be amended to say they aren't making the contention that doing these acts the optician is both violating this law and also violating the practice of optometry statute and the medical practice statute.

Mr. Daugherty: When the evidence is all in, we may desire to amend this petition, the answer, but I am advised by co-counsel that the evidence may substantiate this position.

Judge Murrah: Very well.

Judge Vaught: I think you should clarify it before you——

Mr. Daugherty: I think the point you have, your Honor, in mind is that question about can he fit and adapt when he gets the prescription.

Judge Murrah: Yes.

Judge Wallace: If that's the case, Mr. Daugherty then, you are admitting Section 2 is unconstitutional, as I view Section 2, because it just states very plainly that a man can't do that unless he has—let's see—"* * * to give [fol. 326] any treatment or training designated to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this section, except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes, 1951, may in a written prescription, or its duplicate * * *"—or he can do what this man was doing, Mr. Hill was doing there when he fitted those glasses to Mr. Phillips; is that right?

Mr. Daugherty: I don't believe he has to be an optometrist to do that. I think all optometrists can do it.

Judge Wallace: It says licensed under the provisions of Chapters 11 or 13, has to have the qualifications of an optometrist.

Mr. Daugherty: We don't interpret it that way, your Honor.

Judge Murrah: How do you interpret it, then?

Mr. Daugherty: We interpret it, Judge, we interpret that from the start-off with the eye examination, it must be made by a professional man; then he fits, he may grind that lens if he wants to, then he may fit it to the face; but if the professional man, and this is normally the ophthalmologist, it could be an optometrist, if he wants someone else to dispense that, then he may send that prescription to a dispensing optician, and in accordance with the prescription he may have the lens ground, and then he may fit the glasses [fol. 327] to the face of the patient.

Judge Wallace: That isn't what Section 2 says.

Mr. Daugherty: I believe that is the intention of the Legislature, your Honor, whether it says it or not.

Judge Murrah: I think we will have to accept the Attorney General's interpretation of any construction made upon it to determine the constitutionality; it would be our duty to give the constitutional interpretation, if we can.

Mr. Daugherty: That's true. We don't interpret it that the prescription needs to contain data on that, except some prescriptions do, like the distance before the eyes and angle in or maybe a——

Judge Wallace (Interposing): Well, it says, "It shall be unlawful for any person, firm, corporation, company or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes, 1951, to fit, adjust, adapt, or in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this section, except that persons licensed under the provisions of Chapters 11 or 13 of [fol. 328] Title 59, Oklahoma Statutes, 1951, may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eyeglasses, prisms, tinted lenses, frames or appurtenances thereto * * *".

Well, do you concede that it's not necessary then for this man to qualify as an optometrist to do that?

Mr. Daugherty: He does not, sir, in our opinion, he does not. What this means, coming down to where we find the word "except", the law says that these professional men did all of these things, except that they permit certain things to be done on their prescriptive authority. Those things are to interpret their prescription, and then in accordance therewith after the same has been interpreted, the glasses prepared, they may then fit them to the face of the patient, provided, and this is a very important provision of that section, "provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person."

Now it's the purpose of the Legislature to make the professional man responsible for the eye care. If he wants to delegate part of it to someone else to do, such as a druggist or an anesthetist, something of that kind, he may do [fol. 329] so, but he himself is responsible to see that it is properly done.

Judge Wallace: Dr. Coston said this morning that it

didn't make any difference if the glasses were not properly fitted, no injury.

Mr. Daugherty: No, sir, no permanent damage to the structure of the eye. He did say that it could be aggravated, but he did say that there could be a loss of efficiency or could bring about a nervous condition. I think it would be no more or less at the most than that. As far as damaging the structure of the eye, no one will wear glasses that would do that so long that it would occur, but there can be damage to the efficiency of the person, there can be damage to his nervous system, there can be discomfort to the person, which in general terms definitely pertains to the health and welfare where if he has got properly fitted glasses, he won't suffer from nervousness, discomfort, loss of efficiency. That is the police power exercised by the Legislature to avoid those things.

Judge Murrah: Our first duty is to pinpoint the impact of this law.

Mr. Daugherty: Yes, sir.

Judge Murrah: What is the incidence of the law upon these plaintiffs, and that largely depends for the purpose of this case upon your interpretation of what you contend [fol. 330] that it does, and if you say it doesn't do this, we would accept that, of course. That does not mean that we might not accept that, but if you say, if the Attorney General says it doesn't prevent them doing this or that or the other, I think we'd be bound, I think we'd accept that because we certainly wouldn't read something into the law which the Attorney General said was not prohibited.

So it's tremendously important, it seems to me, for us to determine just exactly what you contend.

Mr. Daugherty: That's correct. May I point out that——

Judge Murrah (Interposing): You don't have to just now.

Mr. Daugherty: Yes, sir.

Judge Murrah: But keep that in mind with respect to the proof. We don't want to go far afield on proof on the issue that you don't contend for.

Mr. Daugherty: That's right. That is plain, sir.

Mr. Woods: May the Court please, one thing while we are on this that I want to mention, because I don't believe I have made it clear. As we understand the issues that have been

framed by the pleadings in this case, and by their application to this statute, a dispensing optician, such as Mr. Hill, cannot sell frames for eyeglasses. Suppose one of your Honors would want a new pair of frames for his eyeglasses, he [fol. 331] cannot go to Mr. Hill and purchase those frames and either have the lenses just like they are in your existing glasses inserted in those or your old lenses taken out of your old glasses and put into new frames, without a prescription.

Judge Murrah: I think that is important. There seems to be a thin dividing line between constitutionality there.

Judge Vaught: Does the State contend that?

Mr. Daugherty: I was lost in his question.

Judge Vaught: Do you contend that if an individual who has a pair of glasses goes into Mr. Hill's store, for instance, and he wants to get a new pair, a new frame, and he wants him to take the lens out of the old frame and put in the new one, you say that he can't do that without a prescription?

Mr. Daugherty: One moment, sir, I was just trying to get——

Judge Murrah: Do you or don't you?

Mr. Daugherty: On my feeling, my feeling is that the law does not prohibit a duplication of frames, does not prohibit duplication of frames, but it does prohibit the duplication of lenses.

May I have a moment to confer with counsel here?

Judge Murrah: We will not bind you to that, but you [fol. 332] can readily see how vastly important that may be in this case, because arrogating one business to another without any——

Judge Vaught: What do you say about putting them in new frames, not any lenses in that; and a great many of these frames are as much for decorative purposes as anything else. You say he can't sell those or he can't advertise them, he can't exhibit them in his place of business so the public may see them?

Judge Murrah: For instance, Judge Vaught has this in mind, if I may—suppose that my wife has a prescription from her doctor, either an ophthalmologist or an optometrist, and she wants a calico frame and she also wants different colored frames and different designs to wear with different

creations, which she doesn't have, but suppose she did: Now Judge Vaught's inquiry is, can she go down to her optician, who has her prescription, and have two or three different sets of glasses made?

Mr. Daugherty: Very definitely.

Judge Murrah: I think that as far as my thinking is concerned, it's the question that we have in mind, can she buy half a dozen glasses, sets of frames.

Mr. Daugherty: Without a doubt.

Judge Murrah: Made on the same prescription?

Mr. Daugherty: Without a shadow of a doubt she can do that. She would not need a new examination, just need [fol. 333] the prescription.

Judge Murrah: The law does not prohibit Mr. Hill from selling those frames?

Mr. Daugherty: It says he may do that, "and may continue to do the said acts on the aforesaid written prescription."

Judge Murrah: May continue to.

Judge Vaught: Getting back to the other question. Now these frames, they have a great many of them on hand, and they have them exhibited in public places there, you know; in other words, they are advertising that they have these frames. Would you say that was prohibited under the law?

Mr. Daugherty: I believe it is, your Honor, under the bait advertising provision, which is the provision to prevent people from drawing people into a non-professional establishment in search of glasses, or thinking that they could get eye examination or get glasses. I believe that comes within the bait advertising provision of the law, and I think it's amply supported by Supreme Court opinions throughout the country.

Judge Murrah: That relates to another subject. May I inquire from this witness, of course judges don't live in a vacuum and don't decide lawsuits in a vacuum. Between this building and the downtown section there are, I believe [fol. 334] that I recall offhand there are three different dispensing stores, one on the east side and one on the west side, and one on the——

The Witness: Two optometrists and one dispenser.

Judge Murrah: Well now, where is your place of business?

The Witness: Mine is the corner of Couch Drive and Robinson, the Liberty Bank Building.

Judge Murrah: There is one immediately north?

The Witness: That's Dr. Harlow, the optometrist. That's the Petroleum Building. He's right directly north of me; and there's a Dr. Richardson that's also an optometrist and he's on Robinson on the west side of the street just up, well, down this next block here.

Judge Murrah: Do you display glasses in your place of business?

The Witness: Yes, sir.

Judge Murrah: Does he?

The Witness: He hasn't, not since all the ruckus took place Dr. Harlow has.

Judge Murrah: Dr. Richardson does not?

The Witness: Dr. Richardson does not, but of course prior to this law, practically every optometrist who had a ground floor location did display frames.

Judge Murrah: But they have quit?

[fol. 335] The Witness: Yes.

Judge Murrah: If they did before, they do not do so now?

The Witness: That's right.

Judge Murrah: All right, thank you.

(Witness withdraws.)

Judge Murrah: Call your next witness.

Mr. Woods: Yes, sir.

Carl C. Barber, called as a witness on behalf of the plaintiffs, being of lawful age and having first been duly sworn, testified as follows:

Direct examination.

By Mr. Woods:

Q. Will you state your name to the Court, please?

A. Carl C. Barber.

Q. Where do you live, Mr. Barber?

A. Houston, Texas.

Q. And what is your business, sir?

A. An ophthalmic dispenser, or dispensing optician as it is commonly called.

Q. For how long have you been so engaged, Mr. Barber?

A. Nineteen years.

Q. Of what association are you a member?

A. The Texas Association of Dispensing Opticians and [fol. 336] the National Association of Guild Prescription Opticians of America, and the International Guild of Prescription Opticians.

Q. Are you a member of any committees of the Guild of Prescription Opticians?

A. Yes, sir, I am a member of the Medical Relations Committee, the Membership Committee, and a director in the National Guild.

Judge Murrah: At this point the Court will recess for five minutes.

(Whereupon a brief recess was taken, following which the proceedings continued with the same counsel present.)

Carl C. Barber, the witness on the stand when the recess was taken, resumed the stand and testified further as follows:

Direct examination (continued).

By Mr. Woods:

Q. I believe my last question to you was, are you a member of any committee of the Guild of Prescription Opticians.

A. Yes, sir, I am a member of the Medical Relations Committee, the Membership Committee, and a member of the Board of Directors in the National Guild.

Q. Are you here today under instructions of the president of the Guild?

[fol. 337] A. That's right, not appearing in behalf of the particular plaintiff in this case, but in behalf of the dispensing opticians in the State of Oklahoma, and to prevent the encroachment of a younger profession upon a field that has existed for hundreds of years.

Q. Now are you certified by the American Board of Opticianry in any respect?

A. Yes, sir.

Q. What certificate do you hold, sir.

A. Master Optician.

Q. For how long have you held that certificate?

A. I believe about three years. Even since its inception.

Q. Your business is in Houston, Texas?

A. That's right.

Q. And what is the specific nature of your business?

A. Dispensing optician.

Q. And you fill whose prescription in the operation of your business?

A. Primarily the ophthalmologists'. We do fill optometric prescriptions when they are brought to us upon the insistence of the patient.

Q. Does that occur very frequently?

A. Very infrequently. We have one young man in the city who practices optometry who is trying to raise his own professional standards, and today is referring a good many of his patients to dispensing opticians, but he is the excep-[fol. 338] tion rather than the rule.

Q. From your knowledge and experience, the referring of prescriptions by an optometrist to a dispensing optician is rather infrequent and rare?

A. It's quite rare.

Q. Now it's true, is it, that in the field of visual care, the three groups are ophthalomologists, optometrists and the opticians?

A. That's correct, sir.

Q. Will you state for the Court from your own knowledge what the history of the optician is, briefly now?

A. Briefly, the history of spectacles begins, well, actually it's lost in the pages of antiquity, but the first recorded knowledge dates about 2000 B. C. among the Chinese when semiprecious gem stones were used, and used primarily for facial adornment and for gazing at the heavenly bodies. They denoted wealth or position or learning, but it wasn't until Marco Polo in, I believe about 1278 A. D., made a trip to China and returned with the first pair of spectacles that were seen in Europe.

Some attribute the invention of spectacles to an Italian

whose name I have forgotten, but I believe actually Marco Polo returned with the first pair.

After that time, glasses were sold, or hawked, by vendors [fol. 339] on the street for a good many years, until later an English scientist, Sir Isaac Newton, and Roger Bacon, discovered that glasses did have material benefit so far as refractive powers, that they aided the vision of old people, a condition which would frequently be described by "the arms getting a little short", and recommended the use of lens for a visual aid.

Shortly after that time, the first guild of spectacle makers was incorporated, granted a charter in England in the year, I believe, 1485 or 1490, or some two to five years prior to the time that Columbus discovered America.

Shortly thereafter, in the early part of the 16th Century there was another guild established in Germany. The Germans throughout the ages have contributed immeasurably to the advancement of optical science. Gallileo, the Italian, Sicilian, developed the first telescope as a visual aid for viewing at long distances.

In brief, the history of the spectacle maker or dispenser antidates the ophthalmologists and the optometrists both by some four hundred years. At the present day it has been developed into a semiprofession or science.

Q. Approximately when did the ophthalmologist become an eye specialist?

A. Appeared upon the scene in the early part of the 18th Century.

[fol. 340] Q. 18th or 19th Century?

A. 19th Century, I beg pardon; about 1815 or 1820. Certain men in the field of medicine began to turn their thoughts to the development of optical science as a definite part of medicine, and they were the first two truly professional groups to develop the science of eye care. It was not until about 1895, I believe, that a group of opticians—at that time glasses were sold readymade prior to that time—a group of opticians decided that they could do examining and perhaps increase their revenues by being able to examine a person's eyes when they came in, and sell them spectacles; and at the same time they had a desire to improve themselves and create a profession, so they branched out and sought legisla-

tion to establish themselves. I think the first law, optometric law in this country was enacted about 1901.

Q. Where was that, if you know?

A. I believe it was in Minnesota.

Q. Now were those men called the refracting opticians?

A. They were. They did not assume the name optometrists until a number of years later, and they apprenticed themselves to other opticians, refracting opticians, to learn what was then considered just a trade, and up until as late as 1925, I believe it was, you could go to the old Needles Institute in Kansas City and take a quickie course and come out a qualified optometrist, start practicing.

[fol. 341] Q. From the time of the separation of your so-called refracting opticians from, what was the other, the remaining part called, remaining group?

A. Dispensing opticians.

Q. From your knowledge and experience of optometry, has it continued to occupy a dual position?

A. It has very definitely. A goodly portion of them solicit prescriptions from ophthalmologists. They advertise in the newspapers. In fact, I would say that about 98% of the optometrists derive practically 100% of their revenue from the sale of glasses, as evidenced by the fact that many, many optometrists throughout the nation advertise their examinations free of charge. They are interested in the sale of spectacles.

Q. And so by that I take it that there is the merchandising capacity or function of the optometrist, and also the legal professional status of refraction?

A. Very definitely.

Mr. Daugherty: I would like to interpose an objection to the form of the question as being leading and suggestive.

Judge Murrah: It is.

Mr. Daugherty: I'd like to lodge an objection to this entire line of questioning as incompetent, irrelevant and immaterial to the issues of this case.

[fol. 342] Judge Murrah: Overruled. We will permit him to give background.

Mr. Daugherty: Have no objection to background, your Honors, but this question of what the optometrists do in

Texas or in other parts of the country I don't think is particularly material to Oklahoma and our law.

By Mr. Woods:

Q. You are testifying with respect to the practices throughout the United States, and including Oklahoma, are you not, Mr. Barber?

A. Yes, sir.

Judge Murrah: You may proceed.

Q. With respect to the merchandising functions of the optometrists what is it that they handle by way of merchandise?

A. Frames primarily, most of us, including the optometrists, have considerably investments in inventory. I personally have several thousand dollars of those tied up in inventory and expensive frames that vary in price anywhere from $6.00 for the lowest to as high as $500.00 for the most expensive.

Q. In a pair of eyeglasses, does the frame or does the lens represent the greater cost monetarilywise?

A. Today, the single vision glass, the frame represents the greatest cost in the average pair. In multifocal lenses, such a bifocal, trifocal, and double seg lens, of course your [fol. 343] lenses are rather expensive.

Q. Now what are the functions of the opticians in the field of eye care?

A. The optician, of course, as has been brought out before, receives a prescription as a rule from the ophthalomologist and occasionally from the optometrists, that gives the refractive power of the lens, the power desired for that patient, which may include spherical correction, cylindrical correction, the axis, the placement of that axis, prism if it's desired, and the addition for reading if it requires multifocal lens. In no cases that I handle do the doctors put the pupillary measurement, and as a rule they never include the type of bifocal. It is then left up to the discretion of the man who interprets the prescription to first analyze the need of the individual. For instance, you as an attorney, would have different visual requirements to the young lady who works in your office who might require multifocal lens,

and she is using the typewriter all day long, your secretary; she is using a "Line-a-time" that sets back of her typewriter. Her visual requirements are different to your own. You might both have a comparable prescription, you might both require bifocals, but her needs would be entirely different to those of your own, because you are concerned with work on your desk, so the placement of those bifocals before the patient's eyes have a very definite bearing upon [fol. 344] the comfort of that patient and her ability to perform efficiently her work for you.

Q. In that connection, what does the optician do?

A. We take the measurement for placement of segment, determine the type of segment that would best meet her specific needs and your own, and also the type of lens that would be best suited to the particular type of correction that you might be wearing.

In addition to that, you have to determine the facial measurements, the size of the bridge, the placement of the pads upon the bridge for the greatest possible comfort, and for the positioning of that segment before the eyes, the temple measurements, the adjustment and fitting of temples over the ears so that it will firmly anchor that lens in the proper position before the eye and hold it there comfortably, because without comfort from the frame the lens will never perform its duty as it should be, because the patient simply won't wear it in the proper position.

Q. Now in those functions, do you have anything to do with respect to the frame that is going to be dispensed to that person?

A. Very definitely. Of course today with the styling of the frames, it has become necessary that a man be something of a cosmetologist as well as an optician in order to carry out a successful practice, because you must be able to help [fol. 345] your patient in selecting styles that are best suited for the particular wardrobe or facial contours, and also that will still carry out the purpose for which the glasses were intended.

In many instances I refuse to fit patients with certain types of frames, because I know that due to some facial deformity or something of that sort the patient may have that you cannot properly place those lenses before the patient's

eyes, and give them the vision and the comfort that glasses were designed for.

Q. Does the type of frame chosen by the patient or dispensed by you have any relation to the efficiency of the lenses prescribed?

A. It does in many instances, yes.

Q. In what respect now?

A. Well, for instance, there are many, many people, due to the styling factor, who desire plastic frames, colorful plastic frames, perhaps with a woman, with a beautiful gold trim or rhinestone trim, and yet she may not have a bridge that is suited to the fitting of such a frame; a very narrow bridge or an unusually wide bridge would not permit you to properly position those lenses before the eyes to give her the comfort that she was entitled to and that the doctor intended her to have, and it would make a very definite difference in her visual efficiency.

[fol. 346] Q. Does the type of frame dispensed have anything to do with the wearing of the eyeglasses by the patient, any connection?

A. Well, yes, of course, if it isn't comfortable the patient isn't going to wear it and they have wasted their money.

Q. And now you were in the court room, I believe, and you heard Mr. Hill testify about the functions of a dispensing optician?

A. Yes, sir.

Q. You heard that testimony?

A. Most of it.

Q. Is what Mr. Hill testified as to the functions of the dispensing optician in accordance with your knowledge of his historic and present day functions?

A. Yes, sir, it is.

Q. And are those functions, in your opinion, an important part of the eye care rendered by the ophthalmologists throughout the country and in Oklahoma, particularly, today?

A. They certainly are, because the ophthalomologist in his practice is concerned primarily with the treatment of diseases of the eye, and surgery, as well as refracting. He has no time for commercialism in his practice, in the majority of cases. There are exceptions, of course, as we all

recognize; but it requires a great deal of time, a great deal [fol. 347] of skill and a great deal of patience on the part of the individual interpreting those prescriptions and making the glasses, and no busy ophthalmologist could devote his time to that; otherwise he would have no time for his practice of ophthalmology.

Q. In your opinion, what is the character of the acts performed by the optician?

A. Well, the interpretation and fabrication of raw materials into a finished product that will give the patient the most comfortable vision and the greatest visual efficiency, and it's done through first, of course, the processes that have been outlined before, the grinding of the power into the lens, the cutting, edging, the mounting into the frame, the final fitting, adjustment of that frame for comfort upon the patient's face.

Q. Now in your opinion from your experience, is the dispensing optician a person properly qualified to render that service?

A. I think he is better qualified than any other particular field.

Q. Why do you say that, Mr. Barber?

A. Because we have devoted our time exclusively to that. In the schools of ophthalmology there is no time given to the teaching of dispensing.

Q. Do you mean by dispensing now?

A. Fitting, adjustment of frames to the patient's face. [fol. 348] Q. Yes, sir. Now continue.

A. In the school of optometry, the training of the optometrist in most all instances in the field of dispensing, that is the fitting and adjustment of frames, that training is given by a qualified ophthalmic dispenser or dispensing optician, and that course within itself is very brief. Today they are emphasizing more and more professionalism, and more and more emphasis is upon training in pathology and such as that. Consequently they are giving less time to the fitting, adjusting, or to the field of dispensing; so I think that we ophthalmic dispensers are better qualified than any other field to properly fit and adjust the glasses on the faces of the patients.

Q. Is the duplication of lenses of eyeglasses a function within the field of the optician?

A. Yes, sir, it has always been, ever since the time of the history of the first pair of glasses, that's been part of our function and it has a definite bearing upon our business.

Q. Now is that also true of placing into frames of old lenses from former glasses?

A. It is, because many, many times in a city such as our own, we of course have thousands of visitors in the city every day, and many times I have put the lens of some patient, a visitor in our city, into a new frame, due to accident. [fol. 349] In fact, I so happened to have an attorney in my office a few weeks ago from Oklahoma City, who was working with the firm of Baker, Botts—Houston, and he had broken his glasses, his frame, and that man was wearing a trifocal. He simply could not have appeared in court that day without his glasses. With such a law as is proposed here, the man had he come into my place and I were practicing here, I could not have placed his lens into a new frame. He would have had to have gone to some person, had his eyes examined, or else written to Oklahoma City and gotten his prescription and then let them be done.

Q. Now is the duplication of eyeglasses, by that I mean the formulation of extra or two extra pairs of eyeglasses, a large part of the optician's function in his business?

A. A very large part today, because people have become more conscious, more eye conscious, and they realize the importance of their glasses, both as a physical aid, consequently more of them today have extra pairs; they also wear them as complements to their costumes, their mode of dress, particularly so with women, but that is a very definite part, a large part of our business today.

Q. Do you know whether or not when you do not have a prescription from that patient, but he brings in the glasses, that that is done by duplicating the lens pursuant to the measurement of the power of that lens on the lensometer? [fol. 350] A. That's correct, sir. The lensometer is a very precise instrument that gives us the power of a lens very accurately, and if we have a sufficiently large piece of the glass, or an entire lens, then we can duplicate accurately. As respects the turning of a lens in the frame, with the frames which we have today, the odd shapes and such, there is very little chance of a lens turning in the frame. It can,

of course, happen, but if the patient is wearing it comfortably in that position, and usually by looking at the frame you can tell if the lens has turned, due to the odd shapes, we question the patient. If the patient has worn it comfortably in that position, naturally that is the position in which it will be duplicated, although that may not have been conforming entirely or accurately to what was originally prescribed.

Q. In your opinion, would the business of a dispensing optician be materially affected if he could not sell frames, if he could not remove lenses from previous frames and insert them in new frames, if he could not duplicate lenses, if he couldn't place or replace lenses in frames without the prescription of a licensed medical doctor or an optometrist?

A. I think it would break most dispensing opticians, because without that, those extra pairs and the duplications and the replacement of frames, my own business and that of every dispensing optician would drop at least forty to fifty percent.

[fol. 351] Q. Now in your opinion, is there anything in the interests of the public health or welfare that would require that those functions, that is the removal of lenses from old frames and inserting into new frames, the selling of frames, the duplication of lenses, or the placing or replacing of lenses into frames, that is required to be done only by an ophthalmologist or an optometrist?

A. No, sir, I do not.

Q. Or only upon the prescription of optometrists or ophthalmologists?

A. No, sir, I surely do not.

Q. Can you state approximately what percentage of the eyeglasses dispensed in the United States are dispensed by optometrists?

A. In a survey which the National Guild made last year, we found through the gathering of evidence throughout the nation, in fact in all forty-eight states, that there is approximately sixty to seventy percent of the eyeglasses dispensed in this nation today is done by the optometrists.

Q. Yes, sir. In your experience, do you know where optometrists generally have their offices?

A. Primarily in the retail sections or business sections

of the community, either suburban or downtown, and as a rule in ground floor locations, with displays of merchandise, the same as I and others.

[fol. 352] Q. And those locations are generally in retail type areas?

A. Definitely—jewelry stores and such places as that.

Q. Now in your opinion, is the advertising by dispensing opticians detrimental to the public health and welfare?

A. I think it's beneficial, because eye care today has become as important as the care of the teeth. That was brought about by dissemination of information to the public, and I think it makes the public more eye conscious, and brings about better eye health, as long as advertising is done in an ethical manner I see no reason to restrict it in any way whatsoever. It would hurt many of us in the field of dispensing opticianry because we do carry ads, ads that are in good taste, I might add.

Judge Murrah: Mr. Counsel, do you think what this witness thinks about this has any bearing upon the immediate question involved? I don't.

Mr. Woods: Very well, your Honor.

Judge Murrah: It wouldn't make any difference to me what he thinks about it

Mr. Woods: Very well.

By Mr. Woods:

Q. Mr. Barber, do you have any personal knowledge of what is being done by the American Board of Opticianry with respect to the qualifications of dispensing opticians?

A. Yes, sir, they are raising a fund to create an endow-[fol. 353] ment for the establishment of a school to train men in the field of opticianry, that men in the future may be better qualified, and also seeking to aid optical dispensing optician groups in the various states to bring about legislation so that it will be regulated, because that is the only way that you can establish and definitely ascertain the qualifications of a man to enter a particular field.

Q. To your knowledge are there schools for the training of opticians?

A. Yes, sir.

Q. Do you recall where those are?

A. There is one very good school in Rochester, New York; there is a school in the City of New York; there is another in California; and we are contemplating such a school in a junior college in Texas.

Q. I hand you what is marked for identification as Exhibits 14 and 15 and I will ask you to just state what those documents are.

A. The examination and written test given by the American Board of Opticianry, or by the School of Opticianry, and outlines of courses, prescribed courses of the schools teaching opticianry.

Mr. Woods: Plaintiffs offer in evidence Exhibits 14 and 15.

Mr. Daugherty: We don't feel that it is material and [fol. 354] interpose an objection for that reason.

Judge Murrah: Overruled. They will be admitted.

(Plaintiffs' Exhibit 14, being document "Selected Examination Questions and Written Tests", having previously been marked for identification, was received in evidence.)

(Plaintiffs' Exhibit 15, being document "Outlines and Syllabuses", having previously been marked for identification, was received in evidence.)

Mr. Woods: You may inquire.

Cross-examination.

By Mr. Daugherty:

Q. Mr. Barber, are you from Houston, Texas?

A. Yes, sir.

Q. Are you a dispensing optician in Houston, Texas?

A. Yes, sir.

Q. How long have you been in business for yourself, Mr. Barber?

A. Nine years and about eight months.

Q. That is as a dispensing optician?

A. Yes, sir.

Q. Do you do your own lens grinding in your place of business?

A. No, we do only finishing work.

Q. Where do you get your lenses ground?

A. From optical supply houses.

Q. In other words, when you get the doctor's prescrip- [fol. 355] tions, you do not duplicate the lens or you do not prescribe the lens or grind the lens, I should say?

A. No, sir, the actual grinding we do not.

Q. Do you send that prescription to the supply house; is that how that is done?

A. That's right. We buy the so-called finished lens and then cut and edge it and mount in the frame.

Q. Would you require a prescription from an ophthalmologist or an optometrist before you would fit me with a pair of glasses?

A. If you had no pair of glasses that I could duplicate, yes, sir.

Q. In other words, with the exception of the process of duplication, you wouldn't attempt to furnish me with a pair of glasses unless you had in your possession a prescription from a qualified professional man, either an optometrist or an ophthalmologist?

A. No, sir, I would not; I am not qualified.

Q. Now on the duplication matter, how would you duplicate these lens?

A. By the use of a lensometer, which is the instrument known to all of us.

Q. If you had my prescription in your office, would you order my glasses from that prescription?

A. Yes, sir, I would.

[fol. 356] Q. Would you prefer that over the lensometer check?

A. I always prefer it because it is a much simpler matter, and there is, of course, always a possibility of human error.

Q. Yes, sir. Isn't it also true that the prescription recites the doctor's exact desires as to how he wants the lenses prepared?

A. That's correct, sir.

Q. Now isn't it correct that there is some human element involved which might result in error, in the duplication process from the lensometer?

A. There is always the possibility. There is very little possibility of it with a qualified optician.

Q. I am talking about qualified; are there unqualified opticians?

A. I am sure there are. There are unqualified men in every field that I know of.

Q. If I took my glasses to an unqualified optician and he attempted to duplicate them on the lensometer, might he get my prescription all mixed up and deliver me with glasses that would not comply with what my doctor wanted me to have?

A. It's entirely possible.

Q. Is this machine capable of getting out of adjustment?

A. Not without serious abuse or damage.

Q. Do they wear out?

A. Well, I have one in my office that has been in use for [fol. 357] eight years, and I just recently bought a new one. It's as accurate as, or equally as accurate as the new one. It's very rarely that they ever wear out. It's a good investment.

Q. Now when glasses are prepared from a prescription, is there some acceptable tolerance from that prescription which is usually permissible?

A. Yes, sir, there is.

Q. If it is attempted then to furnish me with a set of glasses from the glasses that I have rather than my prescription, by use of the lensometer to ascertain my prescription, does not the lensometer get the prescription of the glasses, provided that there is no human error, rather than the prescription of the doctor which he may have prescribed?

A. That's true.

Q. When someone comes into your office with a pair of glasses and asks you to duplicate them, do you ever inquire into whether or not the glasses are comfortable?

A. Yes, sir, I do.

Q. If the patient says they are not comfortable, what do you do?

A. I recommend that they get their eyes reexamined.

Q. Can you state to the Court that all opticians would do that?

A. I think a majority of them would, sir.

Q. Would some of them likely go ahead and duplicate

[fol. 358] for money rather than have the patient go back to his doctor for a check?

A. There are men without a great deal of conscience in every field. I am sure that some of them would.

Q. Is it possible that someone may come into your place of business and ask you to duplicate a fragment of a lens that might not be of adequate size to permit you to duplicate it?

A. Yes, sir, that has occurred in many instances.

Q. Might not some of these unqualified and unscrupulous opticians that you have mentioned endeavor to duplicate that lens in order to make a sale?

A. I hardly think so in a case like that.

Q. You do not think that is a possibility?

A. I don't think that it's even a probability. I don't believe any man, no matter how unscrupulous, would go so far as to stick his neck out to try to duplicate a lens from a tiny piece of glass.

Q. You think in every case then that the opticians that we have, the dispensing optician, would insist and see to it that the patient go to the doctor?

A. Yes, sir, either that or wire to the city where the man was from and get a copy of the prescription.

Q. If you would undertake to duplicate my glasses here and give me a new pair of glasses, would you also fit them to my face?

[fol. 359] A. Yes, sir, I surely would.

Q. Would you know from my duplicated glasses the distance that the lens should be in front of my face, if I was a post-operative cataract case?

A. I could determine, sir, by your vision, and the comfort of your eyes and by questioning you through subjective questioning I could determine whether or not it was properly placed.

Q. As a matter of fact, isn't the doctor the one to decide distance before the eyes the lenses should be in a post-operative cataract case?

A. No, sir, I don't think so. In post-operative cataract cases, the ophthalmologist frequently gives us the distance at which the examination was made, yes, and we try to fit it at that distance, but in nine out of ten cases that has to

be altered, because when the patient starts wearing them, he will usually find that there is a slight variance of perhaps one of one and a half or two millimeters in the position of that lens to give the greatest possible comfort for all visual activities, whereas under the subjective examination he was looking at a fixed point at infinity during the portion of the doctor's examination, and his visual requirements in everyday life are entirely different, and they seldom ever come out to remain in exactly in that position.

Q. Does the physician give you this distance that the [fol. 360] glasses should rest before the eyes on his prescription?

A. 98% of the cases they do not.

Q. In cases where they do put it on the prescription——

Q. (Continuing) —can you tell that distance from this pair of glasses I hold in my hand?

A. No, sir, I cannot, but I could tell soon whether it was in a comfortable position by fitting it on your face.

Q. You wouldn't have the information as to the exact distance my doctor wanted my lenses to rest before my eyes?

A. The doctor wants them to set in the position that will give you the greatest possible comfort, not at any specified distance, unless it provides the vision for which the glasses were intended, sir.

Q. But that will be the distance that the doctor wanted it, though?

A. It may not be the distance that he wrote on there.

Q. If someone comes into your place of business with a pair of glasses and wants them duplicated, do you ever inquire as to when they had their last eye examination?

A. Yes, sir, I do frequently.

Q. What is the purpose of making that inquiry?

A. Well, there are two purposes, to be quite frank about it: First, I am interested in the patient's comfort and his vision, and if it's been four or five years, I think it's rather [fol. 361] foolish for the man to spend his money on having a lens or a prescription duplicated that is that old, when in all probability there are changes that have taken place within the eye, and they probably could use to advantage a new examination; and at the same time, to be quite honest about it, I would refer that man to an ophthalmologist

because the fact is that is where a majority of my business is derived from.

Q. Do you have any rule of thumb as to when you decide that a prescription has been filled too long back to permit you to duplicate?

A. No, sir. I question the man as to whether or not he is comfortable, and if he has any particular complaints.

Mr. Daugherty: That's all.

Mr. Woods: That's all. Thank you, sir.

Judge Murrah: Let me ask you just one question.

The Witness: Yes, sir.

Judge Murrah: I am not so sure that I reconcile your testimony with the testimony that has been introduced. You heard Mr. Hill testify?

The Witness: Yes, sir.

Judge Murrah: As an optician in Texas do you perform any functions that he does not in Oklahoma?

The Witness: No, sir.

Judge Murrah: Well, I understood you to say that you [fol. 362] are interested in the comfort of the patient's eyes.

The Witness: Yes, sir.

Judge Murrah: From a refractory standpoint?

The Witness: Well, the placement of the glasses on the patient's face has a great deal to do with the comfort of his eyes.

Judge Murrah: Well, I understand that. Does that involve mechanical skill?

The Witness: Yes, sir.

Judge Murrah: Nothing else?

The Witness: No, sir.

Judge Murrah: You don't purport to exercise anything except mechanical aptitude, a skill, beg pardon?

The Witness: Mechanical aptitude to place the glasses in the most comfortable position and to afford him the most comfortable vision possible at the same time.

Judge Murrah: Well, then, you do not lay any claim to professional acumen which Mr. Hill did not profess here?

The Witness: No, sir.

Judge Murrah: That's all.

(Witness withdraws)

Mr. Duvall: If your Honors please, we have a short stipulation with reference to Mr. Hill, one statement that if the question was asked, and counsel agrees that he would testify, had he been asked, that he does do an interstate business, [fol. 363] shipping glasses outside of the state.

Mr. Hansen: We agree to that, your Honor.

Judge Murrah: So stipulated, so agreed.

Mr. Woods: At this time, your Honors, we have some formal exhibits to offer. They are already marked. I just want to offer them at this time.

Judge Murrah: Will there be any difficulty, any question about them at all?

Mr. Daugherty: I don't know what he has in mind, your Honors. He presented to me a large number of magazine articles and we consider them as heresay evidence.

Judge Murrah: Very well.

Mr. Daugherty: Incompetent, irrelevant and immaterial as we view them. I won't say I have seen them all. I saw a large stack of them and looked at a couple of them and that's about the size of it.

Judge Murrah: Are you prepared to object to them?

Mr. Daugherty: Yes, if that is what he has to introduce.

Mr. Woods: I have these depositions right now.

Mr. Daugherty: There is no objection to the depositions.

Mr. Woods: I think there are about eleven or twelve of those articles that I showed to him at the office the other day. [fol. 364] Judge Murrah: Now if there is any question about them and you haven't had the opportunity to examine them or to make an intelligent objection, I think perhaps we should in any event pass it over until in the morning.

Mr. Woods: I intended to give him the opportunity.

Judge Murrah: Very well, do it tonight. Submit them to him so we will be able to expedite it in the morning. It is understood, I assume, that the depositions will be admitted. The Court understands that that was discussed the other day.

Mr. Woods: Yes, your Honor.

Judge Murrah: The circumstance, the purpose for which they are introduced——

Mr. Woods: They are the depositions of the ophthal-

mologists taken at Chicago, of Dr. Benedict, Dr. Culler, Dr. Braley, and Dr. Sheard, and Dr. Emmons at the University of Kansas City.

Judge Murrah: Now generally speaking, is that testimony any different, materially different, than the testimony here today; is it testimony on some aspect of the case which we have not covered?

Mr. Woods: Yes, your Honor. Now the testimony of the ophthalmologists is in line with what Dr. Coston's testimony was this morning. Mr. Sheard is not an ophthalmologist, he is a Doctor of Philosophy and a Doctor of Science and he is head of the Biophysics Department at [fol. 365] Mayo Clinic, and he is an optometrist, and being in that field he testifies as to the functions of the optician, his needs and his vital necessity to the profession of ophthalmology, in that relation.

Mr. Duvall: There are some phases, your Honors, the——

Mr. Woods: Not cumulative, your Honors.

Judge Murrah: That would not prevent them from being admissible.

Judge Vaught: Submit them to the other side, let them examine them and make sure.

Mr. Duvall: We have made copies of the depositions for each member of the Court, for their convenience, your Honors.

Judge Murrah: Submit the copies to Mr. Daugherty if he hasn't seen them.

Mr. Woods: He has a copy of them. These are extra copies for the Court's convenience.

Judge Murrah: Court will recess until tomorrow morning at 9:30.

(Whereupon the evening adjournment was taken, with the proceedings to reconvene tomorrow morning, October 27, 1953, at 9:30 a.m.

[fol. 366] Proceedings

October 27, 1953

Judge Murrah: Proceed.

STATEMENT BY MR. WOODS

Mr. Woods: If the Court please, your Honors, at this time I would like permission to request to address a few remarks to the Court, and those remarks are directed toward what the issues are in this case.

At the time we drew our complaint and filed our brief, we proceeded under the theory that Section 2 of Article 953, by its plain language, required that a prescription be issued and in the possession of the optician for the acts of fitting, adjusting, applying or adapting to the face lenses, prisms; that it be required for the duplication of eyeglasses or the placing or replacing into frames of lenses.

At the pretrial conference, when we were discussing the issues, it is my recollection and it was my understanding that the defendant in the main conceded the correctness of a statement to that effect, and that the issue upon which there might be some basis for disagreement at that time was whether or not that that prescription had to be directed to a particular optical supplier or optician. In our opinion, that was the minimal position of the meaning of Section 2, and it was upon that basis that we proceeded and prepared our evidence.

[fol. 367] When the answer was served upon us on Friday of last week, as I recall, as I construed the issues raised by that answer, and in particular paragraphs 5 and 8, not only did the State accept that issue as it was drawn in the pleadings and as it was discussed at the pretrial conference, but went further; and both of those paragraphs are essentially the same.

I shall direct my attention to paragraph 8, which was in response to paragraph 11 of our complaint in which we set out the plaintiffs were doing all of these things, and that the doing of all of these things, the fitting and the sale and adjusting and adapting of glasses containing lenses prescribed by a licensed practitioner in the State of Oklahoma,

that we were also duplicating lenses and also taking old lenses out of old frames and replacing them into new frames, or making new lenses where a complete duplicate pair of eyeglasses was required and placing those into new frames.

That was admitted in the defendants' answer, and in addition to saying that those acts constituted a violation of Section 953, the defendants went further and said that they constituted a violation of Chapters 11 and 13 of Title 59, those being Chapter 11 the optometry statute and Chapter 13 the practice of medicine statute, which was far beyond their position, as I understood it, at the end of the pretrial conference.

[fol. 368] The State's position in that, and it was reenforced by the brief which they filed with the Court yesterday morning in which they quote an unreported decision in the Oklahoma State Court that held that the judge there held, as I understand the quotation at page 6 of their brief, that the adjustment of lenses into frames, and the adjustment of frames to the face, unless done upon the prescription of an authorized person which gives exact and specific measurements therefor, constitutes the correction, or the correcting or relief of ocular abnormalities by the employment of any means and constitutes the practice of optometry.

In addition to that, as an appendix to the State's brief, is attached a copy of the Attorney General's opinion in 1945 in answer to the specific question of whether the duplication of eyeglasses and the fitting of a customer with frames, or the transfer, as I understand it, of old lenses to new frames, constituted the practice of optometry; and in that opinion the Attorney General indicated under the then existing laws that unless there was a prescription for those services, it constituted the practice of optometry.

Now then, it was upon that basis that we, trying to bear in mind the Court's injunction that we, and our own desire to streamline the evidence in this case as much as possible, developed our case upon that theory.

However, the Court will recall yesterday afternoon a [fol. 369] rather ambiguous position developed so far as the State's exact position on the issues, and in that connection there was some discussion. It is not clear in my mind just what the State's position is, and before we can present

the little remaining evidence we have, I think that that issue has to be clarified, because if I am correct in interpreting what the State may have said at one time, the effect of that, to me, is to read out of the statute words that have a plain and unambiguous meaning.

Now in the first place, quite aside from whether or not the Attorney General of a state with respect to a legislative enactment has the power to, in effect, amend by reading out words that have a plain, unambiguous meaning, we have the situation where counsel as I understand who are appearing in this case as private counsel on behalf of optometrists are making statements as to what the law means.

Now, I don't think, over and above what the Attorney General may say, and throwing that to one side, that statements of private counsel as to what the meaning of this section is can have any binding force and effect. Now in that connection, in the earlier depositions that was——

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Vaught: (Interposing) They are really appearing for the State, are they not, the other party?

Judge Murrah: The Attorney General is here.

[fol. 370] Mr. Woods: Yes, the Attorney General is here.

Judge Murrah: And will undoubtediy speak for the State.

Mr. Woods: I think that is correct, but——

Judge Vaught: (Interposing) I mean the optometrists are not a party to this action.

Mr. Woods: The optometrists are not a party, if your Honor please.

Judge Vaught: It is a matter between the State and the plaintiff.

Mr. Woods: And the plaintiff, that is correct.

Judge Vaught: I just assume that if counsel is representing the State, he has the right to speak for the State.

Mr. Woods: That's right. What raises that particular question in my mind is that in connection with the depositions that were taken here in Oklahoma City it was my understanding that Mr. Daugherty and it appears in there—of course those depositions haven't been introduced into the record yet—that he was appearing on behalf of some optometrists.

Now, it is true he is also appearing here at the same table and sitting with the Attorney General, but I think that raises a point.

Judge Murrah: We will not have any difficulty about that. [fol. 371] You need not worry about that. You just proceed with your argument. I'm sure we will clear that up.

Mr. Woods: Very well, your Honor.

Judge Murrah: It will be the Court's business not to leave the matter in the air as to who speaks for whom.

Mr. Woods: Very well, your Honor.

In connection with these issues, it is very important on the constitutional determination under Section 2, what that language means. If it means, as we read the law and as we understood the meaning at the end of the pretrial conference, then it requires a prescription for the performance of all of those acts not only for the prescription of the lenses in the first instance, we will say where a person is getting a pair of glasses, but also for the purchase of frames at any subsequent time in which those existing lenses might be transferred, or the frames might be broken by a person, or over and above that, where the person may just purely as a matter of taste want a new pair of frames. And, in addition to that, as we read the law, it requires a prescription from a licensed practitioner before a person can go in and buy frames and have lenses duplicated from his existing eyeglasses so he will have extra pairs.

Now as I said, it was upon that theory that we have presented our evidence, and it is important to know whether [fol. 372] that is what the State's position is under the issues as framed in this case. That matter of frames is a highly important item.

Judge Murrah: Yes, we understand your positio. I think that the Court understands exactly what you have in mind.

Mr. Woods: Very well.

Judge Murrah: What say the State?

Mr. Hansen: If the Court please, when I prepared my little trial brief that I filed with the Court yesterday morning, I set forth in Appendix One a copy, for the convenience of the Court, for the sake of clarity, a copy of the bill, quoting the bill. In doing so, I subdivided, as I stated I would in my preliminary paragraphs where I referred to

this exhibit, I subdivided certain of the paragraphs into its natural parts, so it would be more easily read; and so that it would bring to the Court's attention the way that we construed the Act to read, and I do not know whether the Court has examined that Appendix One of our brief. It is just a short brief, your Honors.

Judge Murrah: Yes, I have it.

Mr. Hansen: I thought you might be looking for it; it had a little blue cover.

Judge Murrah: Yes, I have it.

Mr. Hansen: That appears after page 21. The brief has [fol. 373] just twenty-one pages, and after that I set forth as Appendix One the Act itself.

Judge Murrah: Now Mr. Attorney General, you can readily appreciate the importance of your construction of this Act, because the Court would certainly, I think the Court would be bound by the Attorney General's interpretation of this Act; don't think the Federal courts have any power in the absence of authoritative decisions to the contrary. Whatever interpretation you place upon this Act would be binding on this Court; certainly, if it wouldn't be absolutely binding, it would be too persuasive for us to take any other position, because this Court can readily say that that would, your interpretation of it, would be binding to the extent that it would be your duty to enforce the Act, and the Act, and the enforcement of the Act, based upon your interpretation, would be the incidence of the Act in a constitutional sense.

Mr. Hansen: I don't agree with that, your Honor, entirely. I don't think that my construction or our construction would be binding on the Court. I think that it would be a matter of considerable persuasiveness to the Court, as we are the ones that are charged with its enforcement, as [fol. 374] well as the various county attorneys are primarily charged with the enforcement, and I think, it would be our idea that it certainly should be carefully considered by the Court. I don't think it's binding upon the Court.

Judge Murrah: If not binding, certainly it would be so persuasive that we would be most reluctant to take another position.

Mr. Hansen: I'd be glad to state my views upon the matter here.

Judge Murrah: Have you stated them in this brief?

Mr. Hansen: Sir?

Judge Murrah: Have you stated 'hem in the brief?

Mr. Hansen: No, sir, they are not. The brief was very quickly prepared. As the Court may know, I have had a good deal of trouble lately with my own eyes. I can hardly read and I have difficulty reading what I have before me. However, I had an operation just a short time ago, and so I therefore have been more or less at a loss in preparing for this case, although I have done the best I could.

Judge Murrah: That's perfectly all right.

[fol. 375] Mr. Hansen: I will be perfectly willing to give the Court my idea of the meaning of this law for what it is worth.

I will say this, as brought about yesterday, that in our answer, that we have filed, in our paragraph 5 of our answer, that we, the defendants, admit the material allegations of the facts set forth in paragraph 8 of said complaint, but allege that the acts of Lee Optical, Carp and Douglas as set forth, violate not only the provisions of House Bill 953 but of Chapters 11 and 13 of the former law.

It was our thought in filing, we certainly admit all the allegations of fact that was the material part that we had in there. We said they were performing all those material acts. We could have stopped there, but we went a little further. We said those acts violated, we didn't mean to say that each and every act that they say they are doing would be in violation, but we are saying that their acts violated, at least certain of those acts violated the provisions of the Act.

[fol. 376] There was question as to what we meant by that. We said it violated it. We didn't mean to say that it violated each and every word they had said that they were doing, that that was a violation. That was not our intention, and it was our intention to clarify that in our oral argument and our statements. It was suggested to the Court that we prepare an amended answer to that paragraph 5, and again to the associated paragraph which is paragraph 8, and I have prepared one, hoping to take this up with counsel, my associate counsel here before the trial

proceeded, but since the Court has that impression, I am agreeable to filing it now.

Judge Murrah: You need not. You may consult counsel if you wish.

Mr. Hansen: But before I begin to make any statement as to it, here we come in in more detail as we consider these acts, which of these acts violate these laws and thereby in effect say that the things that we do not say violate it, do not violate it because we try to separate them.

If the Court please, I just feel if I am going to answer that question now and go into the matter at this time, that I should have a few minutes to consult with my associate counsel, consider their views, before I go further upon the matter.

Judge Murrah: I think the Court will be glad to give you [fol. 377] that time.

Mr. Hansen: If the Court please, to clarify the issue; we thought that we would file this as the testimony developed, but the Court wishes us to file it now and so we can narrow this issue down at this time, and if I have a little time to consult my associate counsel, I think we would be willing to file it now and then go into the matter.

Judge Murrah: Very well, we urge you to do that. How much time do you think——

Mr. Hansen: I should think ten minutes will be ample time.

Judge Murrah: We will give you fifteen.

(Whereupon a brief recess was taken, following which the proceedings continued with the same counsel present.)

After Recess.

Judge Murrah: Proceed.

Mr. Hansen: If the Court please, in order that our position may be clear as to what constitutes a violation of the law, of what section, especially as to Section 2 and Section 3.

Judge Murrah: Yes.

Mr. Hansen: I call the Court's attention to the thing and then if the Court could sort of find and follow as I read this section here——

[fol. 378] Judge Murrah: Be glad to.

Mr. Hansen: I think it will make it a little easier to explain our idea of its real meaning.

As Section 2 provides, "It shall be unlawful for any firm, corporation, company or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Session Laws 1951"—that is the medical practice act and the optometry act—here are the things that I have cited. I have indented these paragraphs starting out I thought with each one being more or less separate, a little easier to read in this way: "To fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person."

Then dropping down to the exception here, "except that persons licensed under the provisions of Chapters 11 or 13 * * * may in a written prescription or its duplicate authorize"—optical suppliers to do those things.

In other words, no one, the statute provides that no one but a licensed physician or an optometrist can do the acts mentioned in the first paragraph unless they do it upon the prescription supplied through an optical supplier to the optician.

Then it says, "To duplicate or attempt to duplicate, or to place or replace into the frames any lenses or other optical appliances which have been prescribed, fitted or adjusted [fol. 379] for visual correction, or which are intended to aid human vision."

No one under the statute except a licensed optometrist or a physician may do those acts, except—we come down again to that exception, that these persons who are so licensed may by written prescription authorize an optical supplier by written prescription or its duplicate, may authorize any optical supplier to interpret that said prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses or frames or eyeglasses and so forth. They may do those things pursuant to prescription.

We think that means this, that if an optometrist or ophthalmologist writes a prescription, he can authorize the optical supplier to follow that prescription, and in so far as that prescription gives measurements, it must be followed, those must be followed, must not be departed from: but if

in his prescription, which he has a right to do, if he leaves out things other optometrists or ophthalmologists might put in there that he does not put in there, why then he leaves up to the optician the doing of those things. In other words, pursuant to that prescription, in accordance with the prescription, and you must follow that prescription in so far as it goes, and it certainly must give the measurement of the lens itself, but if the prescription fails to give some definite data which he is willing to leave to [fol. 380] the optician to do for him, a man that he would trust and for which acts he is responsible under the law, he may do so. In other words, the prescription need not put everything in that one optometrist or one ophthalmologist might deem necessary and proper, but he has got to follow it in so far as it goes, and he must not do those things unless he has a prescription, and he must follow that prescription in so far as it goes; but if it requires him to go ahead and do things that the optical physician or ophthalmologist has left out and left to him to do, and for which the ophthalmologist in doing so makes himself responsible under the law, that is as far as the prescription needs to go, and that is our idea of that part. I think that he can do any of these things.

Judge Murrah: Can he do anything except that which is set forth?

Mr. Hansen: He must follow the prescription. He must not depart from the prescription, but things not covered by the prescription, why of course he can go ahead and do. That's why the Legislature made them responsible for the acts of the persons when they turned that over, if they didn't give sufficient definite instruction for him to do it and something wrong happened, if there is a liability which would arise under the statute, he would be responsible. He could have gone further; he didn't go further, but he must write [fol. 381] the prescription, it must have the measurement. The other things, we don't think it would be necessary. We think that is up to the physician or the optometrist. We do not think he needs to go further.

Judge Vaught: While we are on that, let me ask you this: Suppose that one should go in there and have a broken lens, is your interpretation to the effect that if that man

made the lens originally, or if he has a prescription in his own file in his office, that he can go ahead and make that correction?

Mr. Hansen: We think that if a man comes in with a broken lens, and presents that to an optician who does not have the original prescription, or a duplicate of the original prescription, that he cannot duplicate that upon his own responsibility.

Judge Murrah: By use of the lensometer?

Mr. Hansen: Yes, sir, by the lensometer.

Judge Vaught: I don't care to inject any new evidence, but two years ago, for instance, I was holding court in Enid. I dropped my glasses, broke a lens. I couldn't see. You know, if a judge can't see, he is as bad off as a lawyer that can't see. I went into an optician there, office there at Enid. I told him who had made my glasses, who the doctor was and who the optician was. He says, "You just leave them here." He called the optician and got the prescription. [fol. 382] Now would you say that that was a violation of the Act?

Mr. Hansen: I think that he would have to have the prescription or a duplicate of the prescription on file with him before he could do it, yes, sir. I doubt if a court, if he had—say it would be phoned to him or wired to him, I am doubting very much, I am quite sure the State would not think an act of that kind, where it was done upon the measurement of the optician or the optometrist, he has those—not just a mere question of duplication from the lens—if he has those; it says upon the written prescription or a duplicate, that's what ought to be done. I am rather sure we wouldn't be filing, we wouldn't encourage the filing of an of an action, but I think as far as the wording of the statute is concerned, getting the literal interpretation.

Judge Vaught: I was on a hunting trip a few years ago and down in a small town, and one of these little contraptions here that fits on my nose came off, and the sharp point made it very disagreeable to wear. Now I went into a little shop down there, I don't know whether he was an optician or ophthalmologst or what ever you would call him, but he said, "Yes, we have those", and he put one on in a few minutes. I went on my way. Now would you say that he had the right to do that?

Mr. Hansen: I say certainly the statute expressly — that [fol. 383] right, but the statute says here at the conclusion of Section 2, "provided, however, that this section shall not prevent a qualified person from making repairs to eyeglasses." So anything that comes within the purview of repairs, that is expressly excluded. He may do that, but it would not be, we do not think that it would constitute a repair coming in with a broken lens. You don't repair those lenses, you don't glue them together. He grinds new lenses, and to put them in a frame, adjust that frame upon the face of the customer, we say that he could not do that, but he could make any repair, anything which comes within the purview of repair, because it's expressly authorized by the Act.

Judge Vaught: What do you understand by "qualified person"?

Mr. Hansen: I think any person who purports and claims to be qualified. I think all the opticians would say they are qualified. I think other persons who may not hold themselves out to be opticians, I think you could go into a jewelry and anybody that would want to take on the duty of repairing those glasses, even though he wasn't an optician, I think he could do that. I think I could do it, even though I would charge compensation for it, because as long as the statute doesn't go ahead and prescribe what the qualifications are, of this repair are, I think we could assume that it would be——

[fol. 384] Judge Vaught: (Interposing) Do I understand your interpretation of this Act is that if the optician has a prescription that he can do any of the things mentioned in Section 2?

Mr. Hansen: Yes, sir, if he has a prescription or a duplicate of a prescription, and we also say that that prescription would not necessarily have to be addressed to him. It might be addressed to anyone, but he would have to have the prescription or a duplicate of the prescription, and that prescription should be followed by him in so far as the prescription gives directions, leaving to his discretion under this statute anything that would not be a departure from the prescription.

Judge Murrah: That also means that he could duplicate the glasses by the sale of another glass, with a different

frame, so long as he had the prescriptive authority on file?

Mr. Hansen: That's exactly correct, Judge. He can do just as much at that time as he did if he was the one to whom the prescription was originally presented.

Judge Murrah: But you deny that he could replace, refit, or readapt, adjust a glass from the use of the lensometer, by use of the lensometer?

Mr. Hansen: That alone, without a prescription.

[fol. 385] Judge Murrah: Without prescriptive authority. He cannot take the glass, the lens and duplicate it by the use of his lensometer as demonstrated here in court?

Mr. Hansen: Nor fit it upon the face of the customer. We say that is prohibited by this statute. We think that it was also prohibited by the old statute, although I want to make that clear: When that matter came up in our office and I cited here an opinion of the Attorney General, put it in my appendix in this brief, clearly stating in the language introducing that in the preliminary part, that we realize that it is not binding upon the Court, but persuasive to our view of the law before writing this new law, that a correct interpretation of the law prohibited that. The law did not expressly say so. The law, it's our interpretation, prohibited it but it's a matter of interpretation and with which interpretation a good many differed, whereas in this law, it has stopped arguments, and to make it clear they wrote in this law that which we said the prior law should be construed, if properly construed, to prevent; and here they expressly stated it.

Here, now, no one need say "Well, I did the act. I didn't know that it was unlawful." They might have said that before. I know we are all presumed to know the law, but the law doesn't specifically spell it out.

Judge Vaught: What is the controversy then between [fol. 386] the parties as to the Section 2, if you agree to those? What do you say now? You have heard his interpretation.

Mr. Woods: The controversy is in these respects, if your Honors please: First, as I understand what counsel has stated, a prescription such as Exhibit 21 in this case, which specifies only the power of the lenses, if it's given to the optician, permits him to do every one of the acts enumerated in Section 2.

All right now, the next thing I come to is this: As I understand his statement, I cannot go in to an optician and say, "I would like to buy these frames", and I would ask him to take the lenses out of my existing glasses and put them into these new glasses, purely the mechanical operation of taking those old lenses out and reinserting them in these new frames, unless I have this type of prescription here.

Now, we say that that function he is doing is mechanical, that it has absolutely no relation to any matter of public health or welfare, and that the effect of this statute in requiring that is to take away these opticians' business, a major portion of their business, which is the sale of frames, either for the insertion of your old lenses or for the insertion of new lenses duplicated by means of a lensometer for an extra pair of glasses; or in another instance, where I might break my frames, a zyl frame which is a plastic type [fol. 387] of frame, something like this, cannot be, if it's broken, there is no way it can be repaired; so it has to have either the old lenses if they are not broken, inserted in this frame, or new lenses if those are cracked or broken, ground, cut, edged and inserted in this frame.

Judge Vaught: What do you say on that point?

Mr. Hansen: I say that if I break my glasses, or take his glasses over there, if they are broken, and if they have to give me a new pair of frames and fit the lenses that I have in those frames and adjust those frames on my face, we are saying this law makes that unlawful. We are saying—we realize that that might be inconvenient to some people but lots of laws are inconvenient to people, we realize that that might cause them the loss of a certain income—but lots of our laws prevent people from earning as much as they did before, still they are proper laws.

That is a matter of argument, but the factual situation, we absolutely agree with counsel that such a matter would be, unless he had a prescription or a duplicate of a prescription, would be a violation of this law.

This person who has broken his lenses, broken a lens, I should say, that can't be duplicated and put in a frame. We say that if the lenses are not broken, and they want to get some new different frame or if the frames are broken and that frame can be repaired, of course it can be repaired

[fol. 388] because the statute expressly authorizes it, but if it requires not a repair of a frame but the replacement of a frame, giving a new frame, different style of frame, we are saying that under the law he has to have a prescription, but we say that all of those require, of course require the adjustment of that to the face, and we say that that is a violation of law, and we say that this law intended to make it clear, just as we say that under the former law, we quote on page 6 of our brief under the decision of the former law by the only case that's been tried in Oklahoma, District Court decision, but here's what Judge Ballaine under the Tulsa County case said. That's why we say it's not only a violation of the present law which is clearly spelled out, but under the former law as we interpret it, right or wrong, as we interpret it.

In this case Judge Ballaine, Tulsa County case involving Chapters 11 and 13, supra, I quote now from his decision, "The adjustment of lenses into frames and the adjustment of frames to the face, unless done upon the prescription of an authorized person which gives exact and specific measurements therefor, constitutes the 'correcting or relief of ocular abnormalities by the employment of any means', and constitutes the practice of optometry."

And then he enjoined these people, "from performing or aiding or abetting in the performance" of such an act, [fol. 389] and of course they violated that; they were cited for contempt. That's a different story, that's a different action.

Judge Murrah: Was that a case that arose under this law?

Mr. Hansen: That arose under the old law as we construed it. Now we have the thing spelled out in our law, and we think here we have an express authorization for prescriptions. We didn't have any express authorization for prescriptions at that time. In fact by implication, by a little interpretation or implication it would even prevent the optometrists from even giving a prescription. We didn't so hold, the court didn't so hold, but it had that idea; but under the new law we think it requires giving a prescription, and that prescription under the new law does not provide that specific instructions be given for all the details therein, but leaves that to the man who writes the prescription. They don't need to give all of those details therein,

and if they don't give them it leaves it up to the optician filling the prescription to do the best that he can, and they are responsible for it.

Judge Vaught: You are agreed on everything except this: That if there is to be a new lens, or if the lens are to be fitted into a new frame or a corrected frame of any kind, you contend that he can't do that unless he has an original prescription on file.

[fol. 390] Mr. Hansen: Yes, sir.

Judge Vaught: Or a duplicate. You contend that——?

Mr. Woods: That is unconstitutional.

Judge Murrah: Your issues are clearly defined. I don't think they could be more clearly defined. Now shall we pass—do you have anything further there?

Mr. Woods: If your Honors please, there is one further ramification or facet of this. For example, Judge Vaught's question was about the repairing of the pad, as I understand, which was broken on his eyeglass. Now when that is replaced in a great many instances, as the Court saw from the evidence and heard, that involves fitting, adjusting and adapting to the face those glasses in order to get them to set properly on the face of that person.

Now this statute prevents that unless there is a prescription.

Judge Vaught: What do you say to this last sentence, "provided that this section shall not prevent a qualified person from making repairs to eyeglasses." Now that would cover most any kind of repairs except as the Attorney General contends, the placing of either the lenses themselves into frames or making a new lens. That is the only distinction.

Judge Murrah: Mr. Attorney General, would you say that as an incident to permitted repair of eyeglasses the optician [fol. 391] could adjust and apply them to the face?

Mr. Hansen: Yes, sir; whether that is a wise law or not, I think that's what the Legislature said—"provided that this section shall not prevent the qualified person from making repairs to eyeglasses"; and as long as he is making a repair, as long as it comes under the purview of the word "repair", anything that would be incidental to that repair I think would be proper.

Judge Murrah: Does that include adjustment, if the optician placed a new, I believe they call it "eye pad"——

Mr. Woods: Correct, your Honor.

Judge Murrah (Continuing): —to the glass, then I suppose that it's contemplated that he would have to adjust that to fit the nose so that it would be comfortable?

Mr. Hansen: It might include that; I am not sure.

Judge Murrah: Do you concede that that would be a proper function incident to the proper repair?

Mr. Hansen: I would say just anything, he can repair the glasses, and of course that would mean, let's see—make a person a pair of glasses, the whole thing, and if it's a question of repair I think he can do it. However, I have here, it may not be very binding, I just brought here at——

Judge Murrah (Interposing): May I interrupt? He could adjust the repair?

[fol. 392] Mr. Hansen: Yes, sir, anything that he had to do to make the repair, workable repair, I think he could do.

Judge Murrah: I see.

Mr. Hansen: I have here the definition of the word "repair" from Webster's International. Of course we all know the meaning of it pretty well without quoting it, but it reads, "Repair: restoration after decay, waste, injury or partial destruction, supply of loss, reparation, as a repair of a building, often the plural, to make repairs * * *". In other words, if it comes within the general ordinary meaning of the word "repair", he could do it and anything that would be incidental to repairing that glass and to making it useful, after he has made the repair as long as it's limited to repair, I think he can do.

Judge Murrah: Repair or restore, if he can restore it, repair it, he could restore it to its original comfortable position on the face?

Mr. Hansen: I think, for instance, if a frame would be broken, say it was a wire frame, I think he could solder it together.

Judge Murrah: Well, suppose I break this, what do I want to say——

Mr. Woods: Temple piece.

Judge Murrah: Temple piece. Suppose I break the tem-

ple piece and I take it, could he replace the temple piece [fol. 393] and adjust it so that it would fit comfortably?

Mr. Hansen: I have doubt upon that; I have doubt upon that.

Judge Murrah: What would be the difference?

Mr. Hansen: Every little angle that comes up here, every particular thing that's going to be challenged, will have to stand upon its own bottom, and I wouldn't want to be saying as to what, and trying to enumerate here which comes under the word "repair", but I would say generally that as far as what the courts have interpreted the word "repair" to mean, and the courts would have to interpret that, he can do those things.

Judge Vaught: About the best definition of repair is "repair". You can't make it any clearer than that.

Mr. Hansen: There is another matter that's brought up here under Section 3. Of course, the Court read at the conclusion of Section 2, said "provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person." In other words the statute so recites. Now I come to Section 3, and therefore some connection on that, reads—I provided that again in my little memorandum if you follow me there.

Judge Murrah: Where is that?

Mr. Hansen: On page 2 on the appendix there.

[fol. 394] Judge Murrah: Yes, we have it.

Mr. Hansen: "It shall be unlawful for any person, firm, company, corporation or partnership", and I come to my subdivision there, just take the first thing, first paragraph, "To solicit the sale of spectacles, eyeglasses, lenses, frames, mountings, prisms, or any other optical appliances or devices, eye examinations or visual services, by radio, window display, television, telephone directory, display advertisement, or by any other means of advertisement."

That is the first thing—or "to use any other method or means of baiting, persuading, or enticing the public into buying spectacles, eyeglasses, lenses, frames, mountings, prisms, or other optical appliances for visual correction."

Then it's got a proviso—those are the two things that are

prohibited, more or less the same thing, but related to each other.

> "Provided, however, that the provisions of this Act shall not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor of said commodity or material."

We can jump that and come down to the last paragraph, "Nor shall anything in this Act prevent ethical * * *", [fol. 395] we can jump that; then come down to the last paragraph, which I think needs a statement from us as to its meaning because there was a question in relation to this I think yesterday:

"Nothing in this Act"—I think this came on in an amendment to the Act—"Nothing in this Act", that is not important, "Nothing in this Act shall prohibit the sale of ready to wear glasses equipped with convex spherical lenses nor sunglasses equipped" and so forth, "when sold as merchandise at any established place of business and where the selection of the glasses is at the discretion of the purchaser."

We think the question arose, the question was asked if a person, a merchant downtown, is selling as merchandise this type of glasses here, which are nothing more or less than magnifying, or just for sunglass, would he be prevented from advertising those things. We don't think so. We think when they put the exception in this Act, and said that nothing in the Act will prohibit the sale of these glasses when sold as merchandise, just over the counter, sold in the manner provided there, that the Legislature intended to permit those sales to go on without any of the inhibitions of the Act.

Therefore if that merchant—we never have heard yet of a merchant advertising these things, it's not an evil that [fol. 396] will come up, it's never been brought to our attention—but if a merchant is advertising things his store of this particular type and in the particular manner, if he would advertise that he had some of these glasses for sale, we don't think there would be an inhibition by the Act.

It might have been better for the Act to so provide; we don't think it does so provide.

It is true that it only says here, "Nothing in this Act shall prohibit the sale of" these, and doesn't say the sale or advertisement, but we think that would be necessarily eliminated from the operation of the Act; nothing in the Act shall prohibit the sale, therefore nothing in the Act that would prohibit the advertising, because it would not be so called.

I wanted to bring that to the Court's attention so there wouldn't be any question as to that feature. I don't think it's involved in this case, because I don't believe these gentlemen here—but of course, this law is not just a law regulating these optical companies; this law relates to every optical company in the State of Oklahoma whether they have skilled opticians or unskilled opticians; and regardless of the manner, it applies to all. This action is not one just against these particular defend nts. This action is one for declaratory judgment as the whole law, and so what these particular people do is of no consequence to me, particular [fol. 397] consequence to me in the interpretation of this law, because it's got to apply—that's all our idea, more or less goes to the question of argument.

Judge Murrah: That is sufficient. Now Mr. Attorney General, would you be kind enough to have your remarks transcribed for the benefit of the Court?

Mr. Hansen: Were they taken down? We will be glad to.

Judge Murrah: You could easily uinderstand how they would be helpful.

Mr. Hansen: Yes, be very glad to order it.

Judge Murrah: Any other remarks?

Mr. Hansen: I was going also to say that the two paragraphs that the Court called to our attention here, that are possibly not as clear as they should be, and we will prepare and file before the conclusion of this case—I already have prepared in the rough and I want to take it up with co-counsel, they don't agree with everything I said—upon the wording, and we will try to bring these things out in that answer, as to the amendment of paragraph 5 and 8, as the Court suggested we should do yesterday, and I worked on it this morning.

Judge Murrah: Yes.

Judge Vaught: One other question.

Mr. Hansen: Yes, sir.

[fol. 398] Judge Vaught: Now you agree that an optician may furnish these glasses, and you have heard the testimony of one witness that it was necessary for them to have quite a supply of those frames on hand. Now would you say that this law prevents them from exhibiting those frames inside their building in any way they wanted to?

Mr. Hansen: Yes, sir, we—inside the building, no sir; window displays, now, not inside the building. We think that this law prohibits a thing that is often referred to as bait advertising, that is advertising over the radio or newspaper advertisements or window displays—some of them come out with big bay window displays where they have exaggerated windows so they can display, induce people to come into their place of business, and then when they get in there they find the sad news, "No, we can't sell you these things except upon a prescription." And of course they always suggest or could suggest or there is a possibility of suggesting—when we are talking about the constitutionality of the law we look at the evils that might flow from it, for these laws are held valid if they reach any lawful public purpose—and it has inducement for people to come into the place of business, look these things over; and they often have an arrangement with some physician, they may not, or may—some optometrist—if not an optometrist they do have with someone, and which almost makes the physician [fol. 399] or the optometrist, if they are in a smaller town, almost forced to come and get their business from the optical house, because the physician can't advertise but the optical supplier can.

Were this statute invalid, he can advertise if he wants to and he can get anybody coming in, he can corner the business to all intents and purposes, with such advertising, window displays and all these other things that have been prohibited here. It just gets an opening wedge for corporation practice.

Judge Murrah: But it does not prevent an optician from maintaining a showcase inside his place of business?

Mr. Hansen: Of course not, no, sir.

Judge Murrah: Where he exhibits.

Mr. Hansen: Of course not. That is not our view.

Judge Murrah: That is not the Attorney General's interpretation?

Mr. Hansen: That is not our interpretation.

Judge Murrah: Thank you.

Mr. Woods: I think counsel has given a very fair and complete statement. In view of what he has said and the issues, I would like to request permission to recall Mr. Hill for just two or three questions, going to this matter of frames.

[fol. 400] Judge Murrah: You may.

Mr. Woods: Thank you.

ALLEN D HILL, recalled by the plaintiffs for further examination, being of lawful age and having previously been sworn, resumed the stand and testified further as follows:

Redirect examination (Continued).

By Mr. Woods:

Q. You are the Mr. Hill who was sworn and testified yesterday?

A. Yes, sir.

Q. Mr. Hill, I ask you whether or not in the operation of your business you sell frames to customers.

A. Certainly. That constitutes the most profitable part of my business.

Q. Now do you sell those frames only to persons whose prescriptions you have filed in your store?

A. No, I sell them to anybody that wants to buy one from me; they may come in off the street, be referred by a friend, or any number of means of getting in there.

Q. Can you state approximately what portion of your business is represented by the sale of frames to persons coming in to your store without prescriptions?

A. I would say probably 25%.

Q. Yes, sir. And what portion of your business is repre-
[fol. 401] sented by, or what portion of your income is represented by the sale of frames to all classes of persons?

A. I would say probably between 60% and 70%.

Judge Murrah: Repeat that. I think that's very important. I understand.

Judge Vaught: 25%.

Judge Murrah: Where there is no prescription.

Judge Vaught: Where there is no prescription, but all told about 60% to 70%. That would include prescriptions?

Mr. Woods: The question, I will restate it.

Judge Murrah: I think I understand it, but you may do so if you wish.

Mr. Woods: The last answer of Mr. Hill was in response to my question relating to the sale of frames to persons both with prescriptions and without prescriptions.

The Witness: Yes, sir.

Mr. Woods: And the previous question was with reference only to those persons who purchased frames without prescriptions.

The Witness: That's correct.

Judge Murrah: You said that was about 70% of your business?

The Witness: Yes, sir.

Judge Vaught: 25% was without.

The Witness: I'm speaking of the profitable end of the [fol. 402] business.

Judge Murrah: Well, I don't know whether I understand what you mean or not. Judge Vaught understands it. I don't.

Mr. Woods: My question was what portion of his income from the operation of his business was represented by first the sale of frames to persons who did not have prescriptions on file with him, and what was your answer with respect to that?

The Witness: My point is that in the sale of lenses the profit is relatively small as compared to the profit contained in the sale of a frame. Therefore, from a net profit angle, the sale of a frame is very much more important from a commercial standpoint.

Judge Vaught: What was his answer to the question? I want to get Judge Murrah and myself straightened out, sir.

Mr. Woods: I want to get it straightened out, too, your Honor.

Judge Vaught: I understand this, let me state it: That from the sale of frames, the sale of frames to those not having prescriptions is about 25%.

The Witness: Yes, sir.

Judge Vaught: The sale of frames to all persons including those that have prescriptions and those who do not have, from 60% to 75%, the total.

[fol. 403] The Witness: Yes, sir, the total income, we'll say.

Judge Murrah: Total income from your business.

The Witness: Net; I'm speaking of net.

Judge Murrah: 75% is from the sale of frames?

The Witness: Yes, sir.

Judge Murrah: I see.

By Mr. Woods:

Q. Can you state whether your experience is typical of other opticians in this state, or is there a difference from yours in any way?

Mr. Daugherty: Object to that question, if the Court please, as being beyond the realm of this witness' knowledge, no basis laid for what other people.

Judge Vaught: Don't answer it unless you know.

Judge Murrah: Yes. You may answer if you know.

Mr. Woods: If you know you may answer.

The Witness: Know what, what is the question?

Judge Murrah: Is your business typical.

The Witness: Well, I should say that probably it's typical in some respects, but I would say that the smaller dispensers who have established more recently than I are even more dependent upon the sale of frames than I am. In other words, they are very much more dependent on the sale of frames and dispiay of frames than I am, because a lot [fol. 404] of my work is referral.

Judge Murrah: That's all right.

By Mr. Woods:

Q. You were speaking of frames without prescriptions?

A. Yes, sir.

Mr. Woods: That's all. You may inquire.

Mr. Daugherty: No questions.
Judge Murrah: Anything further?
Mr. Daugherty: No questions, your Honor.

(Witness withdraws)

Oran Rips, one of the plaintiffs, called as a witness on behalf of the plaintiffs, being of lawful age and having first been duly sworn, testified as follows:

Direct examination.

By Mr. Woods:

Q. Will you state your name, please, sir?
A. Oran Rips.
Q. And where do you live?
A. You mean now?
Q. Yes.
A. In Tulsa.
Q. Are you a licensed physician in the State of Oklahoma?
A. I am.
Q. Are you practicing as such?
[fol. 405] A. I am.
Q. And where is your office, sir?
A. At 301 South Main.
Q. Where?
A. 301 South Main.
Q. In what city, sir?
A. In Tulsa.
Q. You are one of the plaintiffs in this action?
A. I am.
Q. From whom do you rent office space?
A. I rent my office space from the Zale's Jewelry Company.

Judge Vaught: Speak out just a little louder.
The Witness: From the Zale's Jewelry Company.

By Mr. Woods:

Q. I hand you what is marked Plaintiffs' Exhibit 22, and I will ask you what that instrument is.

A. Well, this is the lease that was issued to me by the Zale's Jewelry Company.

Mr. Woods: Plaintiffs offer in evidence Exhibit 22.

Judge Murrah: You should have submitted that to him a long time ago.

Mr. Duvall: It was, your Honor, it was——

Mr. Woods: (Interposing) Exhibit to the complaint.

Mr. Duvall: Immediately after the lawsuit was filed.

[fol. 406] Mr. Hansen: We have seen it, your Honors.

Mr. Woods: An exhibit to the complaint, your Honor.

Judge Murrah: Any objection? Be admitted.

(Plaintiffs' Exhibit 22, being document "Lease Agreement", having previously been marked for identification, was received in evidence.)

By Mr. Woods:

Q. Dr. Rips, I hand you what is marked Plaintiffs' Exhibit 23, and I will ask you to state what that is, what that purports to be a copy of.

A. That is a copy of a cancellation of the lease.

Q. Did you receive the original of Plaintiffs' Exhibit 23?

A. I did.

Q. On or about the date that that exhibit bears?

A. Well, just around that time.

Mr. Woods: That is also a copy of the exhibit to the complaint.

Judge Murrah: It is admitted now.

(Plaintiffs' Exhibit 23, being letter dated September 1, 1953, to Dr. Oran Rips from Zale Jewelry Company, having previously been marked for identification, was received in evidence.)

By Mr. Woods:

Q. Doctor, I will ask you if you have any opinion or judgment as to the value of your leasehold interest from the Zale Jewelry Company, what it's worth to you?

A. Well, I consider it's worth to me $25,000.

[fol. 407] Mr. Woods: You may inquire.

Cross-examination

By Mr. Daugherty:

Q. Dr. Rips, how long have you lived in Oklahoma?
A. Well, I used to practice here before and I have been here since the 17th of June this time.
Q. 17th of June this year?
A. From—this year.
Q. Is the Douglas Optical Company also located in the Zale Jewelry Store?
A. They are.
Q. Who operates the Douglas Optical Company?
A. Well, I wouldn't know; I think it's the Lee Optical.
Q. Does Ellis Carp own the Douglas Optical Company?
A. Yes, sir.
Q. Have you ever worked for Ellis Carp?
A. I did.
Q. Where?
A. In Laredo, Texas and Corpus Christi.
Q. Did you work for him on a salary?
A. Yes.
Q. Did you work for him in the Zale's Jewelry Store?
A. Over here?
Q. No, sir, at Laredo and Corpus Christi.
A. No.
[fol. 408] Q. Where did you work for him in Laredo and Corpus Christi?
A. At the Lee Optical, Laredo.
Q. Where was that store located?
A. Well, they were located, I think on Hidalgo Street.
Q. How about Corpus Christi?
A. They are located in the Medical Professional Building.
Q. Did you ever work for Ellis Carp in a Zale's Jewelry Store in Texas?
A. No.
Q. Have you ever worked in the Zale's Jewelry Store any place besides Oklahoma City or Tulsa, rather?
A. No, sir.
Q. How long did you work for Ellis Carp?
A. About two years.

Q. Did you work for him on a salary?
A. Yes.
Q. What kind of work did you do for Ellis Carp?
A. I refracted.
Q. Did you refract patients that he would send to you?
A. I refracted patients that came to the establishment.
Q. What was the name of that establishment?
A. The Lee Optical Company at Laredo and the Pearl Optical Company at Corpus Christi.
Q. Now with reference to the time that you moved into the Zale's Jewelry Company in Tulsa, when did Ellis Carp [fol. 409] and Douglas Optical Company move into the Zale's Jewelry Store in Tulsa?

Mr. Woods: If you know.
The Witness: I don't know.

By Mr. Daugherty:

Q. Were they there when you came in?
A. They were.
Q. Do you know how long they had been there?
A. I don't know, definitely.
Q. You have no idea how long they had been there?
A. No, I haven't.

Judge Murrah: What was the question?
Mr. Daugherty: I asked him how long Douglas Optical Company had been in Zale's Jewelry when he opened his office there. You said you don't know.
The Witness: (Shakes head negatively)

By Mr. Daugherty:

Q. Who negotiated this lease with the Zale Jewelry Company for you?

Mr. Woods: Now just a minute. I object to that. There has been no testimony that anyone negotiated it for him.
Judge Murrah: He may answer.
The Witness: Well, I negotiated directly with the Zale's. [fol. 410] Judge Murrah: Beg pardon?
The Witness: I, directly with the Zale's.
Judge Vaught: You did it yourself?
The Witness: Yes.

By Mr. Daugherty:

Q. Where?

A. I negotiated it in Tulsa, through Tulsa office.

Q. How did you happen to come to Tulsa, Oklahoma and locate your office in Zale's Jewelry Store?

A. Well, I always wanted to come back to Tulsa, and I understood Mr. Carp—I was on vacation in California, I had an Oklahoma license, and Mr. Carp told me that the doctor over here died, and that they needed a doctor.

Judge Murrah: Zale's Jewelry Store needed a doctor?

The Witness: Yes. The doctor that was working there before I came died.

By Mr. Daugherty:

Q. Is that the reason you came to Zale Jewelry Company?

A. Yes.

Q. Now I believe you testified that you did refraction work on patients that came into the place of business known as Lee Optical Company?

A. Yes.

Q. Do you do refraction work in Zale's Jewelry at Tulsa [fol. 411] on patients that are referred to you by Douglas Optical Company?

A. I do.

Q. Does the Douglas Optical Company run advertisements in Tulsa?

A. They do.

Q. Do they do it now?

A. They do.

Q. Do those patients find their way to your refraction room?

A. Yes.

Q. Does Douglas Optical Company maintain a window display?

A. They do.

Q. In the Zale's Jewelry Company?

A. They do.

Q. What do they display in that window?

A. Frames, easy terms, something like that.

Q. Now is it your position that you and the Douglas

Optical Company have no working arrangement with reference to these refractions?

A. None whatsoever.

Q. Do you make a charge for your refraction?

A. I do.

Q. Now after you refract a patient, where do you send the patient?

A. Well, I generally give them a prescription. They can [fol. 412] go wherever they please, I tell them. Most of them go there, because they generally come from there.

Q. Do you ever tell them to go to the Douglas Optical Company with their prescription?

A. No.

Q. Beg pardon?

A. I don't instruct the patients to go anywhere. They can go where they please.

Q. Where do most of your patients come from?

A. Most of the patients come from Douglas Optical because I am handy there.

Mr. Daugherty: That's all.

Mr. Woods: That's all. Thank you, Doctor.

(Witness withdraws.)

Ellis Carp, one of the plaintiffs, being called as a witness on behalf of the plaintiffs, being of lawful age and having first been duly sworn, testified as follows:

Direct examination.

By Mr. Woods:

Q. Will you state your name, please?

A. Ellis Carp.

Q. Where do you live?

A. Dallas, Texas.

Q. Would you speak up so we can hear you?

[fol. 413] A. Yes, sir.

Q. What is your occupation?

A. I am an optometrist, licensed in the State of Texas.

Q. For how long have you been so licensed?

A. Approximately fourteen years.

Q. Are you licensed in any other state as such?
A. No, I am not.

Mr. Duvall: We can't hear you.
The Witness: I am sorry.

By Mr. Woods:

Q. Do you practice optometry in any place?
A. Other than Texas?
Q. No, I'm asking, do you practice optometry any place?
A. Yes, I practice optometry in Texas.
Q. In Texas; do you practice optometry in Oklahoma?
A. No, I do not.
Q. Are you the owner of the business known as Douglas Optical Company?
A. Yes, I am.
Q. Are you the sole owner of that?
A. Yes, sir.
Q. And does Douglas Optical Company have any business in the State of Oklahoma, do they have any business location in the State of Oklahoma?
A. Oh, yes; I'm sorry, I misunderstood you.
[fol. 414] Q. Where is that?
A. That's located at 301 South Main——

Judge Vaught: (Interposing) Speak out louder.
The Witness: 301 South Main Street in Tulsa, in the Zale Jewelry Company.

By Mr. Woods:

Q. What is the nature of the business of the Douglas Optical in Tulsa?
A. Dispensing optician.
Q. And you are one of the plaintiffs, as the individual owner of Douglas Optical in this suit?
A. That's correct.

Mr. Duvall: Talk louder.

Q. Do you have any connection with the plaintiff Lee Optical in this suit?

A. I'm sorry.

Q. Do you have any connection with the plaintiff, Lee Optical Company?

A. Yes. I'm the president of the corporation known as Lee Optical Company of Oklahoma.

Q. That is a corporation?

A. Yes, sir.

Q. Does it have any place of business in the State of Oklahoma?

A. Yes, it does.

[fol. 415] Q. Where is that, sir?

A. 30 North Robinson in Oklahoma City.

Q. And what is the nature of the business operated by Lee Optical at that place?

A. That of a dispensing optician.

Q. Now in connection with the operation of the Douglas Optical and Lee Optical in Oklahoma City, what portion of your total business is represented by the sale of frames to persons coming in to those places?

A. The sale of frames constitutes the biggest part of it, perhaps as high as 70% of the total volume of the business.

Q. Now can you tell me what portion of the 70% is represented by persons who come to your place of business and have no prescription?

A. I'd say approximately half, or even a slightly higher percentage than half.

Judge Vaught: Half?
The Witness: Half of it.
Mr. Woods: Of the 70%?
The Witness: 30-40%.

By Mr. Woods:

Q. When a person comes to your store and wants to purchase frames, can you state what is done with respect to his lenses for those frames?

A. Well, if the lenses are of similar shape to the frame [fol. 416] that they desire and the frame is available in that size, they are removed from their old frame and placed into their new frame. If they are of a different pattern or size, or cut, so that they couldn't be inserted in the frame of their

choice, the lenses are neutralized on the lensometer, and lenses of equivalent power are made and inserted in that new frame.

Q. Dr. Carp, do you have any opinion as to the amount you would be damaged if you could not sell frames without prescriptions in Tulsa, and could not either replace the patient's existing lens in that frame or duplicate the lenses?

A. I'm pretty sure I could figure it approximately.

Q. That's what I want, approximately.

A. Ca, I'd say perhaps in the neighborhood of $1,000, $1,200, just from the one item alone, a month.

Q. A month, $1,000 or $1,200 a month?

A. Yes, sir, based on the volume of business that is being done at this particular time.

Q. Now can you state, do you have any opinion about the damage to Lee Optical in Oklahoma City if it could not sell frames and place or replace lenses or duplicate lenses in those frames in Oklahoma City?

A. Well, it would be of a lesser amount. Our business is comparatively new in Oklahoma City. I'd say perhaps in [fol. 417] the neighborhood of $500.00 a month.

Q. That's your best opinion, that the damage would amount to approximately $500.00 a month in Lee Optical?

A. I think that would be pretty close.

Q. Is that based upon the business you are doing at the present time?

A. Yes, sir.

Q. Has your business been increasing since you have been in Oklahoma City?

A. Yes, it has.

Q. Now tell me this, do you—does Tulsa and does Lee Optical of Oklahoma City send prescriptions, I mean send eyeglasses formulated either pursuant to prescription or which contain duplicated lenses not formulated pursuant to prescription, to customers outside of the State of Oklahoma?

A. Yes, we do.

Q. You do that by mail?

A. Yes, sir.

Q. Do you also fill the prescriptions of ophthalmologists from out of the State of Oklahoma?

A. Yes, sir, most certainly do.

Q. And can you state, is there any special location or outside city from which you get prescriptions that you fill?

A. Well, the only one I can think of offhand, I happened to see a prescription yesterday from St. Paul, Minnesota, [fol. 418] I believe.

Q. Yes.

A. From an opthalmologist there, from an individual who resides there.

Q. How about any Texas cities, do you frequently get prescriptions from ophthalmologists in Texas cities that you fill in Tulsa or Oklahoma City?

A. I believe I saw one also from Dallas.

Mr. Woods: That's all. You may inquire.

Cross-examination

By Mr. Daugherty:

Q. Dr. Carp, I believe you said you are from Dallas?

A. That's correct.

Q. You are not a resident of Oklahoma?

A. No, sir.

Q. You are president of Lee Optical Company?

A. Yes, sir.

Q. Are you familiar with the operation of Lee Optical Company here in Oklahoma City, are you familiar with their operation?

A. Well, I guess perhaps not every little detail of it, but the overall picture. I haven't been in Oklahoma City for several——

Q. When did you open Lee Optical Company in Oklahoma City?

A. I believe it was opened in June of this year.

[fol. 419] Q. Had House Bill 953 passed the Legislature at that time?

A. Well, the lease was negotiated in May, the first of May; it had not been passed at that time.

Q. Was it pending in the Legislature at that time?

A. I believe so; I don't recall what the dates are on that.

Q. Had you or any of your agents followed that measure in the Legislature?

A. They may have.

Q. When was Lee Optical Company incorporated?

Mr. Woods: Your Honors please, the record itself I think is the best evidence of its incorporation.

Judge Murrah: It is.

Mr. Daugherty: I have a certified copy of the Articles of Incorporation.

Mr. Woods: When was it incorporated?

Mr. Daugherty: June the 24th, 1953. Any objection?

Mr. Woods: No objection.

Mr. Daugherty: I don't see any need for burdening the record with it.

Mr. Duvall: I don't see any need to introduce it.

By Mr. Daugherty:

Q. When did you say that you opened Lee Optical Company in Oklahoma City?

A. The office was opened in June in '53.

Q. Now do you own stores in the State of Texas?

[fol. 420] A. Yes, I do.

Q. And total stores, how many?

A. That's right.

Q. How many?

A. Well, I operate exclusive offices, I'd say, I believe it's seventeen.

Q. Seventeen exclusive?

A. Yes.

Q. How many non-exclusive do you operate?

A. Leased departments, I'd say approximately eighteen, I think offhand; approximately eighteen.

Q. Do you operate some of your stores in Zale Jewelry Company stores in the State of Texas?

A. Some of them.

Q. And some of them are not in Zale's Jewelry Stores?

A. That is correct.

Q. You employed your co-plaintiff, Dr. Rips, I believe, in the State of Texas?

A. In the State of Texas, yes.

Q. Salary?

A. That's correct.

Q. Did he fill prescriptions for you in Texas?

A. Yes, he did.
Q. Did you also——

Mr. Woods: Excuse me, what was that question again? [fol. 421] (Reporter reads the question.)
Mr. Daugherty: Strike that question because it's improper. I think we had a meeting of minds that it wasn't proper.

By Mr. Daugherty:

Q. Did he make eye examinations for you in the State of Texas?
A. Well, as an employee, yes, he did.
Q. Working on a salary?
A. Yes.
Q. Now did you also have a Dr. Joseph T. Conti working for you in the State of Texas?
A. That's correct.
Q. Did he work for you on a salary?
A. That's correct.
Q. What did he do?
A. Same type of work. We are engaged in the optical business.
Q. Where is he now engaged in business?
A. In Oklahoma City.
Q. Where in Oklahoma City?
A. I believe it's the American National Building.
Q. Is that the same building in which Lee Optical Company is located?
A. That's the same building; different locations, however.
[fol. 422] Q. He is on the third floor and you are on the ground floor?
A. I believe he's on the third floor.
Q. Now when did Dr. Joseph Conti open his office in the American National Building?
A. I don't have that date. I don't know when he opened.
Q. With reference to when you opened the Lee Optical, when did he open his office?
A. I believe it was perhaps near the same or about the same time.
Q. Just prior to the time he opened his office in the Amer-

ican National Building, was he working for you on a salary in Texas?

A. Yes, he was employed by me.

Q. Did he leave your employment in Texas immediately prior to coming to Oklahoma City and opening his office in the American National Building?

A. What do you mean "immediately prior"; if you mean the next day, no.

Q. Within a week or ten days?

A. Well, I don't think it was within a week or ten days.

Q. Well, approximateiy what period of time?

A. Perhaps a month or so. I don't know, several weeks.

Judge Murrah: Did he open his office contemporaneously with the place of business?

Mr. Daugherty: I think that's what he said.

[fol. 423] By Mr. Daugherty:

Q. Now do you advertise by newspaper now?

Judge Vaught: Just a minute. I misunderstood there. When did he move here with reference to the time that you opened this place of business?

The Witness: When did he move here? Well, I'd say he probably moved here within a few weeks of that time.

By Mr. Daugherty:

Q. Was his last salaried job with you before he opened his office?

A. As far as I know. I don't know what he did in the intervening period.

Q. Now does Lee Optical Company of Oklahoma City advertise in the newspaper?

A. You mean as of today, or yesterday?

Q. As of the past ten days, let's say.

A. Last ten days, yes.

Q. Do you advertise the sale of spectacles by newspaper?

A. Sale of eyeglasses, yes.

Q. Sale of eyeglasses?

A. Yes.

Q. Do you also advertise by radio?

A. Yes, I think so.

Q. Do you maintain a window display on the ground floor entrance of your Lee Optical Company in Oklahoma City?

[fol. 424] A. Yes, we do.

Q. Do these advertisements attract customers to your place of business in search of eyeglasses?

A. Well, that's, I certainly hope they do. That's the purpose in buying advertising.

Q. Do some of these customers come into your place of business without glasses and in need of eye examinations?

A. I would imagine there are perhaps some.

Q. Do you recommend that those customers go anywhere for an examination?

A. Yes, they may go anywhere they desire.

Q. If they have no place that they particularly desire to go, do you recommend anyone to them?

A. We have the page of the telephone directory, they can pick any one of those doctors. Dr. Conti is in the building, and knowing that he is capable and that his fees are, I believe, from what I have heard, a little bit lower, we do recommend that they may go there.

Q. Do you have any card with Dr. Conti's name on them in your Lee Optical Company store?

A. As far as I know, no.

Q. As far as you know, you don't have any?

A. No, they may write his name on there for the person if the person can't remember it and wanted to know who, or what, they may give them instructions; if they perhaps [fol. 425] want some other doctor, they would write it.

Q. Dr. Carp, is Dr. Conti an ophthalmologist?

A. Well, I really don't know.

Q. Is he an M. D.?

A. Dr. Conti is an osteopathic physician.

Q. Is Dr. Conti an M. D.?

Mr. Woods: He answered the question. He said he was an osteopathic physician.

By Mr. Daugherty:

Q. Is he an optometrist?

A. He is an osteopathic physician.

Q. Then I take it he is not an optometrist nor an ophthalmologist?

A. Well, now, I don't know whether he'd be an ophthalmologist or not. I know in the State of Texas, an osteopathic physician and a medical practitioner are synonymous, and they have the same license and same duties, privileges, and are called ophthalmologists.

Q. Let me ask you this question: Do you know whether or not Dr. Conti is licensed, first, licensed as an optometrist in the State of Oklahoma?

A. Optometrist, did you say optometrist?

Q. Yes.

A. I wouldn't know for certain. I don't think so.

Q. Do you know what he charges for an eye examination?

[fol. 426] A. I think I heard it's either $3.00 or $5.00.

Q. When he makes an eye examination for a patient, that is a customer that you have sent up to him, does he send that prescription down to you to be filled?

A. I don't believe so. I am sure he gives, I can't speak for him—I assume he follows the same practice as everyone else, gives them the prescription and they are free to take it wherever they want to.

Q. Most of those customers come back to your place of business for the filling of their prescription?

Mr. Woods: I object to that; if he has any knowledge.

Judge Murrah: Overruled.

The Witness: Beg pardon?

Judge Murrah: Answer the question.

The Witness: Do most of them come back?

Mr. Daugherty: (Nods affirmatively)

The Witness: Well, most of them, not all of them.

By Mr. Daugherty:

Q. Most of them do?

A. I believe so. I would say most of them.

Q. Does Dr. Conti make a fee for his charge separate from any fee that you make?

A. Does Dr. Conti receive a fee? He does, he makes his examination, his examination fee.

[fol. 427] Q. Do you have any agreement or any arrangement with him with respect to fees?

A. None whatsoever.

Q. Did you or any of your agents negotiate his lease in the American National Building at the same time you negotiated yours?

A. I did not.

Q. Did any of your agents?

A. No, none of my agents did.

Q. Do you do any of your own grinding in your Lee Optical Company in Oklahoma City?

A. No, not locally.

Q. Do you do any grinding in Douglas Optical in Tulsa?

A. No.

Q. Where do you get your grinding done?

A. Well, most of it is sent to Dallas. We sometimes have it ground locally, but we are able to get better service and better prices by sending it to Dallas.

Q. You send it to the DalTex Company in Dallas?

A. That's correct.

Q. Do you own that company?

A. I am a partner in that company.

Q. Now can you tell the Court what percentage of the prescriptions you fill at Lee Optical Company here in Oklahoma City are prescribed by Dr. Conti?

[fol. 428] A. I don't believe I could; I don't believe I could.

Q. Can you give us an estimate?

A. Well, I'm sure the biggest part of it, but just how many I don't know, as we get prescriptions from out of the state from other ophthalmologists, but just how many I couldn't say without closer examination. I could check back.

Q. Well, as a matter of fact, Dr. Carp, aren't practically all of your prescriptions received from Dr. Conti?

A. I'd say the majority of them.

Q. And do you and Dr. Conti share any of your supplies, such as receipt books?

A. To the best of my knowledge, I don't think so.

Q. Does he get his receipt books at the same place you get yours?

A. Well, I really don't know. Sometimes supply houses—we supply prescription pads, the same as drug stores

supply prescription pads for physicians. As a matter of fact, we send out our prescription books all over the state soliciting business from our DalTex, from the optical laboratory.

Mr. Daugherty: That's all.

Mr. Woods: No questions.

Judge Murrah: Just a moment. Now as I understand, you either own or are interested in eighteen optical supply houses?

The Witness: No, excuse me.

[fol. 429] Judge Murrah: Well, you own eighteen and you are interested—you own seventeen and you are interested in eighteen more?

The Witness: No, may I correct you? I don't own any optical supply houses. I am an optometrist in the State of Texas.

Judge Murrah: Well, you have eighteen——

The Witness: I have establishments. I am associated with that many optometrists as partners, or on an employee basis, in operating optometric offices, which are different from optical supply houses. There is only one optical supply house that I have an interest in, DalTex.

Judge Murrah: What is that?

The Witness: DalTex Optical. The others are optometric.

Judge Murrah: You own one optical supply house or are a partner in the business?

The Witness: Yes, sir.

Judge Murrah: You are interested in it?

The Witness: Yes, I'm a partner.

Judge Murrah: In Dallas.

The Witness: Yes, sir.

Judge Murrah: Then you have eighteen, I believe, optometric establishments?

The Witness: Establishments.

[fol. 430] Judge Murrah: In Texas and Oklahoma?

The Witness: No, Texas.

Judge Murrah: All right. There you maintain window displays in each of those places?

The Witness: Yes, sir.

Judge Murrah: On the outside?

The Witness: Yes, sir.

Judge Murrah: And you also advertise in the newspapers?

The Witness: Yes, sir.

Judge Murrah: And over the radio?

The Witness: Yes, sir.

Judge Murrah: And through other media of advertising, the sale of eyeglasses?

The Witness: That's right.

Judge Murrah: In the examination of eyes.

The Witness: In Texas, yes, sir.

Judge Murrah: Beg pardon?

The Witness: In Texas only.

Judge Murrah: In Texas?

The Witness: Yes, sir. We are permitted to do that in Texas.

Judge Murrah: In Oklahoma you own the Douglas Optical Company?

The Witness: That's correct.

[fol. 431] Judge Murrah: In Tulsa, and that is located in connection with the Zale's Jewelry Company?

The Witness: That's correct.

Judge Murrah: Now is that an optical supply or an optometric establishment?

The Witness: No, that's a dispensing optician.

Judge Murrah: Don't you know what it is?

The Witness: The dispensing optician is what we are limited to.

Judge Murrah: In Dallas you are dispensing optician, that is the Douglas Supply, Douglas Optical Company is dispensing optician or dispensing establishment?

The Witness: You are speaking——?

Judge Murrah: All right, you tell what it is.

The Witness: Douglas Optical is in Tulsa. DalTex is in Dallas. You said Douglas Optical in Dallas.

Judge Murrah: Douglas is in Zale's at Tulsa, Oklahoma?

The Witness: That's the dispensing optician.

Judge Murrah: All right. That is inside Zale's Jewelry Company?

The Witness: Yes, sir.

Judge Murrah: And you maintain window displays there?

The Witness: Yes, sir.

[fol. 432] Judge Murrah: You also advertise through Zale's Jewelry Company the sale of eyeglasses?

The Witness: No, it's not through Zale's Jewelry.

Judge Murrah: You advertise the sale of eyeglasses?

The Witness: Yes, Douglas Optical, yes, sir.

Judge Murrah: By radio, by newspaper and by other means of advertising?

The Witness: Yes, sir.

Judge Murrah: You also employed Doctor—what's his name, who just left the witness stand?

The Witness: I don't employ him.

Judge Murrah: He just works for you?

The Witness: No, sir. He collects his own fees and he pays his rent, he pays his own lease arrangement, and he keeps his own fees. I don't give him anything; he doesn't give me anything.

Judge Murrah: But you have an arrangement with him whereby you send all of your customers to him?

The Witness: We don't send them all. We may refer them, since he is there, the proximity being so close. If they don't care to go there they are free to go elsewhere.

Judge Murrah: The same building?

The Witness: Yes, sir.

Judge Murrah: The same space?

The Witness: Well, it's all inside Zale's Jewelry, yes [fol. 433] sir, it's adjoining.

Judge Murrah: But Doctor, what's his name?

The Witness: Rips.

Judge Murrah: But Dr. Rips has worked for you on a salary?

The Witness: In Texas.

Judge Murrah: In Texas?

The Witness: Yes, sir.

Judge Murrah: That is, he came from Texas to Oklahoma?

The Witness: That's right.

Judge Murrah: From your employ?

The Witness: He was in California at the time.

Judge Murrah: But he had been employed by you?

The Witness: Yes, sir, he had been, yes, sir.

Judge Murrah: But he is just, he is not employed on

a salary with you now, you merely have an arrangement with him whereby you refer your customers to him?

The Witness: That's right.

Judge Murrah: For refraction.

The Witness: That's right.

Judge Murrah: Then you hope that he will in turn, that they will return to the Douglas Optical Company for the prescription?

The Witness: That's correct.

[fol. 434] Judge Murrah: For the fulfillment of the prescription.

The Witness: Yes, sir.

Judge Murrah: Now then do you own the Lee Optical Company in Oklahoma City?

The Witness: (Nods affirmatively)

Judge Murrah: In the American National Building, and you maintain a window display there, you advertise in the papers, and you advertise the sale of eyeglasses over the radio and other means of advertising?

The Witness: Yes, sir.

Judge Murrah: You have a doctor, what's his name?

The Witness: Conti.

Judge Murrah: Who?

The Witness: Dr. Conti.

Judge Murrah: He came here about the time you opened your establishment there?

The Witness: Yes, sir.

Judge Murrah: He had been in you employ in Texas?

The Witness: Yes, sir.

Judge Murrah: He is not now in your employ?

The Witness: No, sir.

Judge Murrah: But he refers all of his—you refer all of your customers to him?

The Witness: We try.

The Witness: That's right.

Judge Murrah: That they will return to you for the fulfillment of their prescription?

The Witness: That's right.

Judge Murrah: And that's your general arrangement throughout your whole business, different establishments you have similar arrangements with other doctors?

The Witness: You mean in Oklahoma or Texas?

Judge Murrah: In Oklahoma and Texas.

The Witness: Well, I don't——

Judge Murrah: Do you own any other establishments in Oklahoma besides the Lee and the Douglas?

The Witness: No, sir, the point I'm trying to make, your Honor, if I may——

Judge Murrah: Well, I'm not trying to confuse you, but you seem confused about your own business.

The Witness: In Texas I can employ an optometrist or physician and they may work for me or either as partners or on a salary. In Oklahoma they do not work for me. They are in their own practice now. Now they had been employed. I knew them in Texas and they had worked for me in Texas, and it is obvious that I had advised them with opening here that it would be a good opportunity. However, that is as far as it goes. They are not obligated to me and I am not obligated to them.

[fol. 436] Judge Vaught: Do you have an agreement of any kind now that you will send these customers to the doctor and that he will have them bring their prescriptions back to you?

The Witness: There is no agreement other than at this particular moment it is to our mutual advantage. He seems capable enough. Usually when a person is satisfied with glasses they come back where they were dispensed, and he seems satisfied with our dispensing; if and when the time should arise that we, and we are getting patients from other ophthalmologists, as I say by being here and by people seeing our frames in the windows, they come in and bring us their prescriptions, so we are gradually building up a business independent of his, what he sends us. It is becoming a smaller and smaller part.

Judge Murrah: In other words, you have no written arrangement, but it works out about that you will exchange business interests, but it does work out that way?

The Witness: Yes, sir, as I said, it works out to our mutual advantage that way. However, there is no agreement.

Judge Murrah: You say that you know that the doctor down here in the American National Building, with whom

you have this arrangement, is competent; you send them [fol. 437] back to him because you know that he is competent, but you don't know whether he is an osteopath or an optometrist or an opthalmologist or an optician?

The Witness: No, he is——

Judge Murrah: (Interposing) Well, do you know what it is at all?

The Witness: Osteopathic physician.

Judge Murrah: That's all you know about him?

The Witness: Yes, sir.

Judge Murrah: That's all.

Judge Vaught: Does the osteopathic physician under the laws of Oklahoma have the same right to practice as an M. D.?

Mr. Hansen: Our office has gone into that a number of times, and we have held that under the law the only person who can practice optometry is a licensed optometrist or a physician and surgeon authorized by law to practice medicine and surgery in Oklahoma, and an osteopath is only authorized to practice osteopathy in Oklahoma, and he is not qualified and we have so held; not only is that true, but we filed an action in Chickasha against an osteopathic physician down there who was trying to practice optometry, and during the course of the action he came in and filed a disclaimer and said—we were seeking to enjoin him—and he said that he would cease to practice, since he had been [fol. 438] advised to do that by counsel, and so the court dismissed the case against him under his express promise in writing that he would cease to practice the optometry in Oklahoma. Our view is that an osteopath is not entitled under the laws of Oklahoma to practice optometry and we have so held in a number of opinions.

Judge Murrah: Proceed.

(Witness withdraws)

COLLOQUY

Mr. Woods: If the Court please, at this time I would like to offer in evidence Exhibits 2 through 12 inclusive, and 36. Those exhibits have been shown to counsel for the defendants. Exhibit 2 is a letter on the letterhead of the Oklahoma Optometric Association from Mr. W. S. Farmer.

an optometrist, and in the office of the Secretary and Treasurer.

The others follow the Court's suggestion, are excerpts from various publications of either the Journal of Optometry or their weekly, other publications of theirs or other pamphlets which are a codification of their articles, and Exhibits 11 and 12 are from the Review of Optometry, taken from the Optometry Journal. They have to do with the adjustment of rimless glasses.

Exhibit 10 is from the magazine "Guildcraft" which is an official journal of the optician's society. Counsel had an opportunity to examine these.

Judge Murrah: Do you have any objection?

[fol. 439] Mr. Daugherty: We have examined the exhibits, your Honors, and we do object to their introduction into evidence for the reason that they are incompetent, irrelevant and immaterial, and for the further reason that they constitute expressions and statements from people amounting to hearsay evidence, affording us no right to cross examination, that there is no reason as we view it for their introduction and we object to them.

Mr. Woods: If your Honors please, I am offering them for the purpose of having a bearing on the background on which this legislation was based, the so-called constitutional facts.

Judge Murrah: I don't want to admit something I just think is clearly erroneous, clearly hearsay. It just makes it more expensive. I don't think you could admit that anything here is material if it's perfectly hearsay now; if it's out of some journal or by an authority, a recognized accepted authority as such, of course that's admissible, I think, if there is serious question about it.

Mr. Woods: Well, your Honor——

Judge Murrah: (Interposing) But just a statement that someone makes here, that states an opinion without any right of cross examination—you know the right of cross examination is the test of trustworthiness.

Mr. Woods: Indeed it is.

[fol. 440] Judge Murrah: And usually that is the basis on which evidence of this kind is admissible, and only a finding or expression of opinion which is based upon evidence of

some kind, of course, that such and such an order, administrative order is a suitable order and such. Just stating my own views, my associates probably won't agree with me, but I don't see the purpose of admitting something that will encumber your record here with a matter that is purely hearsay.

Mr. Woods: If your Honor please, I will address myself first to Plaintiffs' Exhibit 2 which was offered which is a letter from W. S. Farmer, a doctor of optometry here in the State of Oklahoma, and which pertains directly to this legislation. Now I offer that separately at this time.

Judge Murrah: What is it about?

Mr. Woods: It advises that House Bill Number 953 has been introduced by them, if the Court please. It starts off——

Judge Murrah: (Interposing) That is the type of testimony we decided at the pretrial the other day we would exclude and told you so.

Mr. Woods: Your Honors, I am not attempting in any way to get around anything that was agreed upon at the pretrial conference, but it was my understanding that—— [fol. 441] Judge Murrah: (Interposing) Very well. Do my associates understand the nature of the exhibit?

Judge Wallace: You have a copy of it in your brief, don't you?

Mr. Woods: Yes, your Honor.

Judge Murrah: I don't hink it has any bearing at all on the case.

Mr. Woods: Then if the Court please, Exhibits 3 through 12 fall in the general category of articles which have been published in official journals or publications of the National Optometric Association, of which all optometrists, if they belong to the state association here, are members. I am offering those because they have a very direct bearing, in my opinion, upon the background upon which this legislation was based, and are pertinent because they are illustrative of the fact that the statute——

Judge Murrah: (Interposing) You may as well get Dr. Coston or any other witness that has appeared on the witness stand to write us a letter. What would be the difference?

Mr. Woods: Well, I think——

Judge Murrah: (Interposing) The nature of that testimony that you seek to introduce by document is no different than oral testimony that is adduced testifying to the effect of the law, its incidence upon the trade or the business, or [fol. 442] the profession, whatever the case may be.

Mr. Woods: If your Honor please, it's my theory that in a constitutional type case, you are faced, both the Court and counsel, with a situation that is rather removed and different from the ordinary type of litigation. We all know our life today and our legislation is far more complex than it used to be, and in order to understand the entire background, and I am forced to use that word, involved in the field of legislation and its effect, one cannot accomplish that by applying to the evidence the ordinary rules of evidence; I think, in other words, there is greater latitude on the Court's part.

Judge Murrah: Sure.

Mr. Woods: It's almost judicial notice, but it's even an extension of the doctrine of judicial notice, if the Court please.

Judge Murrah: But the rule of evidence with respect to opinion evidence is too well settled for you and I to argue about. I will be glad to confer. What do you think? (Addressing the other members of the Court)

Judge Vaught: Your sole purpose in that is to show that perhaps that optometrists are the father of this bill, that they pushed it through, is that what you are getting at?

Mr. Woods: It is not limited to that, your Honor. It is [fol. 443] that in part, and beyond that. It is to explain the effect this Act has, because as the evidence shows, for example, approximately 70% of the glasses dispensed are dispensed by optometrists. They don't issue prescriptions ordinarily except in a rare case; so the result of that and the effect of that statute is that it takes away from the opticians, throughout the state, as much as 70% or a large segment of their business, when it prohibits them from acting and performing the same functions as they have heretofore in selling frames and in putting either old lenses or

new lenses into them. That is the purpose, the other purpose for which I offer them.

Judge Murrah: I'm not going to admit them. If my associates say it's admissible, it would certainly be admitted, but I think that is clearly inadmissible for two reasons, first it's immaterial, second its purely hearsay, and inadmissible in that it denies the right of cross examination.

Judge Vaught: I doubt if under the condition of the record it's material. That's the main thing.

Mr. Woods: One last thing I want to address myself to, if the Court please. We on October the 15th served a request upon the defendants with respect to what one might term the legistative history of House Bill Number 953. It shows in its original form it is prepared by the Clerk from [fol. 444] the journal out in the Legislature and shows the various amendments that that law went through. It shows the companion bill which was introduced in the Senate and which was identical to House Bill Number 953. I offer this because I think that the bill, the many changes that they went through, has a bearing again upon the background facts involved in this lawsuit.

Judge Murrah: Any objection?

Mr. Hansen: No objection, your Honors. We agreed it might be done. We think its incompetent, and if not incompetent we think it's rather immaterial, but we have no objection.

Judge Murrah: Be admitted.

(Plaintiffs' Exhibit 24, being documents from Senate Journal re House Bill Number 953, having previously been marked for identification, was received in evidence.)

Mr. Hansen: In the briefs I prepared, counsel called attention to the fact that when I came to the bill in my appendix I quoted paragraph 6, I didn't quote paragraph 7, and I think that's rather material.

Judge Murrah: In the appendices?

Mr. Hansen: Appendix 1, I quote the bill, the one we had here, but I failed to quote the last paragraph which is paragraph 7, and I think it's rather pertinent for me to read it to the Court in view of the question you asked me

about osteopathic physicians awhile ago, and that last [fol. 445] paragraph reads as follows:

> "The provisions of Sections 1, 2, and 6 of this bill shall not extend, limit or affect the legal scope of persons licensed under the provisions of Chapter 14, Title 59, Oklahoma Session Laws, 1951."

That chapter is a, it's a chapter, law about osteopaths, and in other words in enacting this bill it was put in there, because so many osteopaths think and believe that they do have the right to practice optometry in the state. Our office has held that they do not. This bill is expressly related that only authorized physicians and optometrists to write prescriptions, which upon its face would have the effect of limiting it to those and to excluding osteopaths, so this paragraph is put on the bill for the purpose that, if under the law osteopaths were authorized to write these prescriptions this bill would not deprive them of the right. Our office held, of course, that they did not have the right, but if we are wrong in our opinion and they did have the right under the present law, this law should not be interpreted to deprive them of that right.

I should have copied that section. I failed to do so.

Judge Murrah: Thank you. Anything further?

Mr. Woods: That's our case, if the Court please.

Judge Murrah: What say the State?

[fol. 446] Mr. Daugherty: May I make one or two statements? I understand that the depositions of the witnesses in Chicago and Kansas City have been introduced in evidence.

Mr. Woods: That's my understanding, Mr. Daugherty.

Judge Murrah: I don't recall whether they have ever been formally introduced or not.

Mr. Woods: I think they were yesterday, but I shall re-offer at this time the originals of the depositions of Dr. Benedict, Dr. Braley, Dr. Cordes, Dr. Culler, Dr. Alson Emmons, and Dr. Sheard, all of which were taken in Chicago. Now in connection with Dr. Sheard's deposition, if the Court please, the clerk informs me that apparently the original has not yet returned.

Judge Murrah: That's all right.

Mr. Woods: I offer also the deposition of Dr. Albert Lemoine, Jr., taken in Kansas City last week, all of those men with the exception of Dr. Sheard being ophthalmologists; Dr. Sheard being a Doctor of Science and former head of the department of biophysics at Mayo.

Mr. Daugherty: We have no objection to the introduction of these depositions other than the blanket objection that [redacted] is considerable material in those depositions that is incompetent, irrelevant and immaterial to the issues of this case. It would be, I am sure, a burdensome task for us to go through by question and answer and by question [fol. 447] and answer interpose an objection. We do wish to point that fact out to the Court, leaving to the wisdom of the Court the consideration of any of this matter which we deem to be immaterial.

Judge Murrah: That is a very fine statement. The Court appreciates it. We realize that in order to pass upon the admissibility of each and every item, it would be necessary to read it, and we certainly like to avoid that. You may be assured that the Court will endeavor to study these depositions with the idea of considering all of that which is material within the rules and boundaries that we have tried to lay down here.

Mr. Daugherty: It was our thought that by doing that, your Honor, we could cut down on the length of the time.

Judge Murrah: It is commendable on your part, Counsel.

Mr. Daugherty: Do you rest?

Mr. Woods: We rest.

Mr. Daugherty: May we move the Court to enter an order to dismiss the complaint on the grounds and for the reason that the evidence of the plaintiffs fails to support a claim on which the relief sought can be granted.

Judge Murrah: I suppose we would want to take the whole case, wouldn't we?

[fol. 448] Judge Vaught: Yes.

Judge Murrah: Overruled. Well, it's a convenient time now. Gentlemen, how much time will the State require?

Mr. Daugherty: Your Honor, we have three witnesses here, and possibly we might reduce them to two. Other than that, I think only argument.

Judge Murrah: Can you finish this afternoon?

Mr. Daugherty: I feel that our testimony can be on this afternoon. The question of argument, of course, is up to the Court.

Judge Murrah: We will settle that after the case is in, yes, sir. At this time the Court will take a recess until 2:00 o'clock.

(Whereupon the noon recess was taken, the proceedings to reconvene at 2:00 p. m. this day, with the same counsel present.)

[fol. 449] Afternoon Session

October 27, 1953.

Judge Murrah: Proceed.

Richard A. Clay, called as a witness on behalf of the defendants, being of lawful age and having first been duly sworn, testified as follows:

Direct examination.

By Mr. Daugherty:

Q. State your name and profession.

A. Richard A. Clay, ophthalmologist.

Q. Where is your place of business, Doctor?

A. 416 Northwest 13th, Oklahoma City.

Q. Are you appearing pursuant to a subpoena that has been served on you?

A. Yes, I was subpoenaed.

Q. Would you state to the Court just briefly as possible your educational background and the societies that you belong to pertaining to your profession?

A. I have an M. D. degree from the University of Oklahoma School of Medicine; and I have an interneship, two terms as resident in ophthalmology at University Hospital; two years in the Armed Services, followed by a year at Cornell Medical Center in New York City in ophthalmology;

[fol. 450] belong to the State and American Academies of Ophthalmology and Otolaryngology, diplomate of the American Board of Ophthalmology, Fellow of the American College of Surgeons, state and national medical associations.

Q. Now you are in the practice of ophthalmology here in Oklahoma City?

A. Yes.

Q. How long have you been in that practice, Doctor?

A. Five years last June.

Q. Do you make eye examinations?

A. Yes, I do.

Q. Pursuant to those examinations, do you write a prescription for glasses?

A. Yes, I do.

Q. Tell the Court the best you can what you normally put in your prescription for glasses.

A. I put the strength of the sphere, the strength of the cylinder, axis of the cylinder if there is a cylinder in it; the strength of the additional correction for near, if there is a bifocal or trifocal, and at times other information is necessary, such as prism content, and the direction of the prism effect. At times it is also necessary to give other information regarding the distance of the lens from the eye, or decentration of the lens if we are trying to get a special effect from the lens.

[fol. 451] Q. Is it true that what goes into the prescription will vary with the patient in his particular case?

A. Yes.

Q. After you make an examination, Doctor, and reduce your findings to a prescription, what do you do with the prescription?

A. I give the prescription to the patient to take to a dispensing optician.

Q. Do you use a dispensing optician in your practice?

A. I have no dispensing optician associated with me. The patient is free to take the prescription where he will.

Q. And do you use dispensing opticians then in the community in connection with your practice?

A. Yes, they are very much an important part of my business.

Q. Will you please state what your usual procedure is in

seeing that your patients take your prescription to an optician?

A. Well, I usually inquire as to whether or not the patient knows of a capable optician. Many of my patients have been to local opticians before, and they will say "I know of someone", and so I give them the sign that I think that's a fine place to go, if that's their desire, and they take it there. Occasionally a patient will tell me that they don't know of anyone in town, and I usually suggest one of three or four or five, usually give them a list of them. The [fol. 452] procedure after that is to have the patient come back to the office for a checking of the final glasses to be sure that the correction is as I ordered, and to be sure that the patient is comfortable with it.

Q. Do you make that check yourself when the patient comes back to your office?

A. Yes.

Q. Do you follow that procedure in every case, Doctor?

A. Occasionally it will vary. Some patient will come in and I am very busy or out of the office and we will have the technician, whom I have trained to do that, to check the glasses according to my finding on the examination, and as recorded on the chart, and then if there is any question at all about the comfort of the patient later, they are free to come back for recheck at my hands, or a complete reexamination if I find that is necessary.

Q. In your experience, do you find an occasional error in the work of the optician in attempting to fill your prescription?

A. Yes, I do.

Q. What do you do when you find such an error?

A. I call the optician and call his attention to the error, and they are very courteous about correcting the error.

Q. Is there any other reason why you might have your patients return to you with the glasses from the optician? [fol. 453] A. None except to satisfy myself that the patient is getting courteous and proper care, and that the patient is getting reasonable service, aside from the correction test and accuracy of the glasses.

Q. When the patient comes to you with defective vision and you undertake to take care of his vision, do you feel

that a professional confidential relationship is created when you undertake to handle that patient's eye troubles?

A. Yes.

Q. You feel you are responsible for that?

A. Yes.

Q. For that care when you undertake to do that?

A. Yes.

Q. Do you feel you hold anyone else responsible for it?

A. No one else except those who are responsible both to me and the patient; the optician is responsible to me and to the patient, but it's my duty to see that the optician's work is accurate.

Q. Do you feel that the professional man should remain responsible for the full effect of any appliances which might be furnished to the patient for the correction of his defective vision?

A. Yes, I do.

Q. Do you believe in that rule and principle, do you?

A. Yes, I do.

[fol. 454] Q. Doctor, in your opinion, are any persons in Oklahoma qualified to make an eye examination other than ophthalmologists or a physician or an optometrist?

A. No.

Q. Do you believe that it's in the public interest and public health and public welfare for unqualified persons to make eye examinations or correct the vision of another?

A. No, I do not.

Q. If I have no glasses and have defective vision and feel that I need glasses, where do you think I should start out in order to get eye care?

A. Well, you would have to start in the office of a doctor who is licensed to examine eyes and prescribe for your trouble.

Q. Do you feel that I should start out in search of eye examination and eye care in the establishment of an optician?

A. No. Occasionally that happens, but as a rule if you have no glasses, you are of course promptly told that nothing could be done for you at that point.

Q. Is the optician qualified to make an eye examination?

A. No.

Q. Are you familiar with this bill that is in controversy in this litigation?

A. Yes, I have read it and I am familiar with it as a lay person can be familiar with a bill of that sort.

[fol. 455] Q. Do you feel that the optician in supplying me with glasses, let's say an initial set of glasses, and fitting them to my face, should do that pursuant to written prescription of either an ophthalmologist or an optometrist?

A. Yes.

Q. Do you feel that is in the public health and public interest that that practice should prevail in Oklahoma?

A. Yes.

Q. Do you feel that the examination of eyes should be handled professionally rather than commercially?

A. Do you mean——

Q. Refraction of eyes for glasses should be handled professionally or should be handled commercially?

A. Well, I don't think that a doctor's services should ever be on a commercial basis.

Q. Do you state then to the Court that an eye examination or a refraction for glasses should be done on a professional basis and not a commercial basis?

A. That's right, I don't think that——

Judge Murrah: He has already answered that question two or three different ways.

By Mr. Daugherty:

Q. Would you state why you feel that way, Doctor?

A. Well, it's against the principles of ethics in my opinion, and the opinion of ages of doctors in the past, that [fol. 456] no doctor should work or should hire himself out to a lay person who makes a profit on his services, because you lose the contact with the patient and the direct patient-doctor relationship that is very important to good health, good care.

Q. In the viewpoint of the patient, or the public which represents the patient, would that be beneficial to the public?

A. Well, if I, for instance, agreed to perform cataract surgery on patients for a layman for a fixed fee per patient

or for a salary, I might be inclined to do cataracts that I wouldn't otherwise do, because I have to keep my job or because my employer tells me to.

Q. Do you sometimes make eye examinations and not prescribe glasses?

A. Very frequently.

Q. How often will that happen in your practice?

A. I would say that I see someone almost every day who either does not need glasses or does not need a change from his present glasses.

Q. Do those patients come to you for glasses if you should prescribe them or change them?

A. My patients would be happy to accept my service and the glasses if I advise them.

Q. Doctor, will you state your opinion as to whether or [fol. 457] not you think the solicitation of the sale of eyeglasses should be permitted by anybody through the mediums of advertising?

A. No, I do not.

Q. Why?

A. Because if we advertise glasses as having the best prices or the easiest to obtain or the best location, or any other of the forms of advertising to entice people to come in, it immediately leads to the practice of substituting inferior materials in order to meet price competition. For example, a batch of glass starting at the factory may be a very large vat of glass, but the finished product may actually contain only about 12% of that glass, or 10 or 12%, we'll say, in finished grade one lenses, but all along the line there are culls. They have ripples or imperfections or waves that are actually not grade one glasses, but those glasses can be bought very cheaply because they are separated as not perfect, and if we have a price advertising campaign, then it's very easy to meet that price competition by substituting inferior glasses and the patient suffers and the patient is not trained to detect the difference.

Q. Getting back to the law now, do you believe it's in the public interest for this law to prohibit rebates from opticians to optometrists or ophthalmologists?

A. Yes, I do.

Judge Vaught: I didn't get that question.

[fol. 458] By Mr. Daugherty:

Q. Do you feel it's in the public interest for this law to prohibit an optician from making or paying a rebate to an ophthalmologist or an optometrist?

A. Yes, I do, and that's been taken care of previously also in a Federal injunction, I believe.

Q. Do you feel that a professional man, namely an ophthalmologist or an optometrist, should permit an optician to solicit business for him?

A. Well, I would make a distinction there between soliciting, that is going out after the business, and a bona fide referral because he thought the doctor happened to be a good doctor, because I think that——

Q. (Interposing) I have reference to that solicitation you mentioned of going out after them.

A. Well——

Q. (Interposing) Is that good for the public interest?

A. Well, I don't want anyone to hunt business for me or pass out my cards on the street corner.

Q. Doctor, if glasses are improperly fitted or adjusted or applied to the face of the patient, is that patient likely to suffer some discomfort?

A. Well, that's quite possible. It would depend a great deal on the correction in the glasses.

Q. In your opinion, will ill fitted glasses reduce the [fol. 459] efficiency of the patient?

A. They may, and in a great many respects: for example, this pair of glasses that I have on could be improperly centered by quite a little bit, because one lens is perfectly plain, my right eye being normal, and the left lens has quite a little correction for nearsighted astigmatism. Decentering the lenses one way or the other a few millimeters wouldn't cause me any trouble, but there are patients who have quite strong corrections, and a few millimeters of decentering of lenses in or out, up or down, will cause a prism effect to be in that glass, which will make the patient uncomfortable or inefficient in his visual accomplishment, and it may interfere with his productivity and his discomfort may cause him to have headache or other discomfort.

Q. Will ill fitting glasses produce any physical damage to the eyeball?

A. I don't think that there has ever been anything to show that glasses that are poorly fitted, certainly within reason, can cause any structural damage to the nerve, the retina, or the lens of the eye, the actual mechanism of seeing. There is some possibility that they might cause muscular imbalance, which had been latent or unnoticed, to become manifest, become exhibited, so that the patient might actually have a tendency for the eyes to deviate out or in or up or down, by the glasses being poorly fitted.

[fol. 460] Q. Then as I understand it, ill fitting glasses can bring about a muscular imbalance?

A. Aside from the discomfort of the patient and lowered visual efficiency, they might also cause muscular imbalance.

Q. Now what would muscular imbalance require in the way of correction, if anything, if the patient wore those glasses for a period of time?

A. Within any reasonable length of time, I expect if the error was not very great, it would be entirely reversible if you take the glasses off and put the correct glasses on; it would be entirely reversible.

Q. What if that is not done over a period of weeks or months?

A. That would have to be qualified quite a little bit. If the variation is great, or if the glasses were worn for a great length of time, or for some months or years, then there might be a permanent muscular imbalance, a tendency for the eyes to deviate that is not constant.

Q. What about the aggravation of a nervous condition or in fact the bringing about of a nervous condition in the patient?

A. Well, improperly fitted glasses certainly can add to the nervous tension of a patient or cause a person to be nervous, can cause headache.

Q. Doctor, when a patient comes to you for an eye exam-
[fol. 461] ination, or that patient comes to an optometrist for an eye examination, is an examination made to see whether or not there are any pathological conditions in that eye?

A. Well, that's a very important part of my examination, and I understand the examination of the optometrists, too, to determine whether or not there is any disease that might influence vision, in addition to the fitting of the glasses.

Q. Are you familiar with the field and general method of operation of optometrists?

A. Yes, I am. My father and brother are optometrists.

Q. Durant, Oklahoma?

A. Yes.

Q. Doctor, in your opinion, if I should require a duplication of my glasses, would it be preferable that they be duplicated from your prescription, assuming that you prescribed my glasses—which you did not—or would it be preferable to have them duplicated by the use of a lensometer?

A. I think in all cases it would be preferable to do it from the prescription which has been written.

Q. Tell the Court why, please.

A. Because in that case there would be no doubt as to what the doctor had intended for you to have in front of your face. It's possible that a prescription might be made for you from the doctor's examination, the glasses filled, and because of a little faultiness in measuring or defect [fol. 462] in properly fitting the glasses which might not have been rechecked by the doctor or might not have been picked up, that your glasses were improperly fitted at the time, and the next time the glasses are made from that pair with a lensometer, the optician would have no way of knowing whether the decentering of the lenses up or down in or out, were intentional on the part of the doctor, or accidental because of sloppy dispensing, so I think it would be preferable to do it from the prescription.

Q. In the interest of public vision throughout the state, would that result in better eye care, in your opinion?

A. I think it would.

Q. Is it so that these lensometers and vertometers sometimes come out of manipulation or out of adjustment?

A. Oh, I think within certain limits, I think probably they do, but they are usually easy to put back in adjustment, and they are usually checked on frequent occasions. I have had my lensometer checked occasionally to be sure it is accurate, and I am sure that others do, too.

Q. But they can come out of adjustment?

A. That's right.

Q. Is the skill of the operator a factor in getting a correct reading on a lensometer?

A. Well, not that it takes any special education or educational background to do it, but it is a mechanical per-
[fol. 463] formance that can be taught, and naturally some people can do it better than others; the skill of the operator is a factor.

Q. Is it so, or not, that an operator might become rusty by laying off of the use of the lensometer, if you know?

A. I doubt that that would be an important factor.

Q. Is the element of human error present in the use of the lensometer in reading a lens?

A. Yes.

Q. Do you know whether or not it is the practice of the optician, if he does not do his own grinding, when he attempts to duplicate a lens by lensometer, that he writes down the prescription he finds from that reading?

A. I do not know.

Q. Is it possible for a lens in a pair of glasses to rotate inside of the frame?

A. Yes, in most frames that is possible.

Q. If the lens rotates——

Judge Vaught: (Interposing) What do you mean by that, Doctor?

The Witness: There are some types of frames that because of their shape the lens cannot rotate, your Honor.

Judge Vaught: Do you mean in the frame, rotate, change position in the frame?

The Witness: In the lens, in rotation or direction.

Judge Vaught: That's a movement of the lens within the
[fol. 464] frame?

The Witness: In the frame, yes, sir. That was a very important factor when there were round lenses, and is a little less important now, but still occurs with the newer shapes.

By Mr. Daugherty:

Q. How about this so-called "brow" type, does it tend to rotate in the frames any?

A. Not nearly as badly as the more nearly round, but it can rotate in the frame, especially if the screw gets loose.

Q. Now if a lens should rotate in a frame, and an attempt

was made to duplicate that lens on the lensometer, would that reading be, with reference to the axis, the optical center, that as shown on the lens in its rotated position rather than its prescribed position?

A. That's right.

Q. If that lens then duplicated, it would not be duplicated in accordance with the doctor's prescription?

A. That's right.

Q. If a pair of glasses are duplicated without the prescription, is it normally necessary for those glasses to be fitted and adjusted and adapted to the face by the person making the duplication?

A. You mean if you take a complete pair of glasses, make a duplicate pair; then the new pair does have to be adjusted [fol. 465] to the face, otherwise the patient cannot wear them.

Q. Do some of your prescriptions contain information that pertains to the proper fitting, adapting and adjusting of glasses to the patient's face?

A. Only if they vary from the accepted routine that is usually used in fitting.

Q. Some of your prescriptions will contain that type of data?

A. That's right.

Q. Normally, can that type of data be picked up by the pair of glasses themselves in the absence of the prescription in hand?

A. Usually the type that I put on the prescription cannot. For instance, the distance between the eye of the patient and the lens as it was fitted in the office. That does not mean that the distance from the eye to the lens is necessarily the same that the patient will wear them, but there are standard tables for computing from the figures which I give to properly place the lens in front of the eye. Another thing which I mentioned briefly a moment ago, if I purposely decenter a lens, say five millimeters, to get a prism effect because the patient has a weak muscle from trauma, or weak muscle from any cause, the lenses might be put on the lensometer, measurement made, and the optician has no way of knowing whether the decentration was intentional or accidental.

[fol. 466] Q. Would he then have to resort to guesswork in order to write his prescription on that lensometer reading?

A. Most likely he would make the lens exactly as it was in the frame, unless he felt that he was qualified to move the thing of his own volition, in which case he would be prescribing actually a new lens.

Q. Doctor, do you insist in your practice that the glasses fitted to the patient's face comply with your prescriptive result?

A. Within the limits of tolerance.

Q. Do you go by whether it is comfortable for the patient or not, or do you go by your prescriptive result?

A. Within reason I go by my prescription, because the patient may adapt to a pair of glasses that are not actually exactly the best for him, and after he has worn those for awhile, he might actually become perfectly comfortable with those and like them better than if they were changed a little bit.

Q. Doctor, are there any dangers of getting incorrect prescriptive result by taking lenses out of one set of frames and putting them in another?

A. Well, by far the majority of lenses could easily be taken from a frame such as I have and such as most people wear and put in another frame of similar shape and size, without any deleterious effect.

[fol. 467] Q. Will there be some cases where there might be a deleterious effect?

Mr. Duvall: Objected to as leading and suggestive, repetitious.

Judge Murrah: It is.

By Mr. Daugherty:

Q. Are there cases where there might be a deleterious effect in taking the lens out from one pair of glasses and putting them in another?

A. Yes, there might be occasions where a lens, especially a strong lens, might be setting at a given distance from the patient's eyes in the worn and loose frame, but in a new frame would have to be placed at a different distance. That

would be especially true in a cataract lens. For instance, the patient might wear the glasses two or three millimeters farther from his eyes with the old worn frame than with a new unworn frame. The difference of two or three millimeters in a lens of that strength could make a difference in the visual comfort and efficiency of the patient, because the lenses are very strong.

Q. Would the same deleterious effects result if the lens had rotated in the frame of the old glasses, should they be placed in new glasses in the rotated position?

A. It would depend on the strength of the lens.

Q. When is it worse than at other times, what type of lens?

[fol. 468] A. Well, if you take a lens with a very strong correction for astigmatism, rotate it in the frame several degrees, it makes a great deal of difference; whereas a very minor correction for astigmatism might not cause any discomfort at all, or any difference in vision.

Mr. Daugherty: Thank you very much. You may cross examine.

Cross-examination

By Mr. Woods:

Q. Doctor, I believe you said that in some cases when you wrote a prescription you would include directions as to the decentration?

A. That's right.

Q. Now in those cases your dispensing optician would make the measurment of the interpupillary distance, I presumme?

A. That's right.

Q. And then would move the axis away from the pupil of the particular eye where you wanted the lens decentered?

A. That's right.

Q. The optician would do that himself?

A. That's right, according to the instructions on the prescription.

Q. Yes. In your opinion, is the dispensing optician you use perfectly competent to determine the interpupillary distance?

[fol. 469] A. That's right.

Q. And they are competent to formulate the eyeglasses you prescribe from the lens blanks they have and the frames they have?

A. That's true.

Q. And they are competent to fit and adjust and adapt those eyeglasses to the face of that person?

A. Yes, that's right.

Q. And you depend upon them to do that?

A. I do.

Q. That's not a part of your practice, is it?

A. No.

Q. Now with respect to the lensometer, did I understand you to testify that you have trained your technician in your office to use the lensometer?

A. Yes, sir.

Q. And in some instances, that technician will check the glasses coming back to see that the prescription the optician has placed in there corresponds to the prescription you have prescribed, the lens you have prescribed?

A. And have on my office record.

Q. And you consider the technician employed by you as perfectly competent and able to do that work, of course?

A. Yes, and I stated that that was subject to my further check if I think there is any reason to do so.

[fol. 470] Q. Now Doctor, in the duplication of a lens by the lensometer, the person using the lensometer would go through the self-same acts that your technician goes through in checking the lens?

A. That's right.

Q. Would he not?

A. That's right.

Q. And of course, there is always the element of human error in everything?

A. That's right.

Q. In operating a lensometer or you in refracting an eye?

A. That's right.

Q. Or anything a person does?

A. That's right.

Q. Now if a person has a pair of eyeglasses prescribed by you, and they have been perfectly comfortable, they are

satisfied with them, if a lens were duplicated for those eyeglasses by the use of a lensometer, and it was the correct duplication, the person would have in effect the same eyeglasses he had been wearing before, would he not?

A. That's right.

Q. I believe you mentioned something about muscular imbalance. Have you in your practice ever encountered a case where an error in the eyeglasses worn by a person has aggravated or caused damage to a muscular condition?

[fol. 471] A. Yes, I have.

Q. How many such cases have you encountered?

A. I have seen a number of cases in which a child with a tendency for the eyes to turn in, or a tendency for the eyes to turn out, might have a deleterious effect by the prescription of farsighted glasses or nearsighted glasses, or proper or improper centration of the lenses.

Q. And you are speaking, are you, of a case where that child, for example, had a myopic condition and they had farsighted glasses?

A. No, not that the patient had a farsighted condition and had myopic glasses, but that we know there is a definite visual relation between a tendency for the eye to turn in and farsightedness.

Q. I see.

A. If that child is nearsighted, it has a tendency for the eyes to turn in, then we may elect to leave the glasses off, because it will have the opposite effect on the muscular imbalance.

Q. I see.

A. The same is true of the tendency for the eyes to turn out, which is usually associated with nearsightedness. We would not want that child to have a correction for farsightedness; it might aggravate the condition.

Q. Yes, but where you would take those glasses off, there [fol. 472] would be no permanent damage to the muscular condition of that child?

A. It would depend a great deal on the degree of deviation, the strength of the lens, how long he had worn them. For the most part, I'd say that there wouldn't be.

Q. That there would be no permanent damage?

A. There wouldn't be, but there might be instances where there would be.

Q. Now the fitting and adjusting and adapting to the face that Mr. Daugherty asked you about, in the case of a duplication, is the same fitting and adjusting and adapting that an optician would have to perform if a frame had been damaged in some way and he had realigned it and put it on the patient, is it not?

A. That's right.

Q. I believe you testified that improperly formulated lenses might have the tendency to make a person uncomfortable or I believe nervous, is that true?

A. That's right.

Q. Doctor, is not that the same type of nervousness that a person might have from an improperly fitted pair of shoes?

A. Well, it may be, yes.

Q. And Doctor, as a matter of fact, if you had a patient who came to you and said that his or her glasses were making him nervous, would you not have a suspicion that [fol. 473] there was some cause for that nervousness far beyond the glasses, and that the glasses were just a symptom of that, would that not be possible?

A. But this is not a patient that has come to me; this is a patient who has gotten his glasses directly from the optician.

Q. Well, either instance, where he has gotten them directly from the optician or where he comes to you and says that his glasses make him nervous, would you not immediately suspicion that there perhaps was some other involvement that was causing that nervousness rather than just a pair of glasses?

A. Yes, and I would check the glasses to see if they were accurate because I wouldn't want to add to that.

Q. Of course.

A. That's right.

Q. Doctor, in your opinion, should your patients come to you for a prescription before they purchase a new pair of frames for their existing lenses?

A. In those cases, no.

Mr. Woods: That's all, thank you.

Judge Murrah: Doctor, did I understand you to testify that it was accepted practice in your office, and generally in your profession, I suppose, for you to prescribe for your patient and the patient take the prescription to an [fol. 474] optician of his choice, his or her choice, to be filled and when it is filled and the patient returns to your office, your technician may check this glass that has been furnished by the optician against the prescription with a lensometer?

The Witness: That's right.

Judge Murrah: You say that is accepted practice for the purpose of determining whether or not the patient got what you prescribed?

The Witness: Whether the prescription matches what he got, that's right.

Judge Murrah: And in determining that, which you consider a very important function——

The Witness: Uh huh.

Judge Murrah: (Continuing)——for their protection.

The Witness: I always ask the patients to come back.

Judge Murrah: But you consider it to be accepted practice to have your technician check those glasses on the lensometer?

The Witness: Yes, sir.

Judge Murrah: And if the lensometer says that it does conform to the prescription, that's accepted?

The Witness: That's right.

Judge Murrah: And you would say that would be acceptable within a tolerance that you would, for which you [fol. 475] allow?

The Witness: Yes, sir.

Judge Murrah: To that extent, then, the lensometer is a mechanical device that is used by your profession for the purpose of accurately determining whether or not the eyeglass that was prescribed is the one that was prescribed?

The Witness: That's right.

Judge Murrah: Exactly.

The Witness: That's right.

Judge Murrah: Or near enough to be.

The Witness: To be acceptable.

Judge Murrah: That's right, to be acceptable. Well,

then, to that extent the medical profession does rely upon the lensometer?

The Witness: Yes, sir.

Judge Murrah: For the purpose of determining the prescriptive—well, I'm trying, I don't know just——

The Witness: Accuracy of the prescription?

Judge Murrah: Prescriptive accuracy.

The Witness: Yes.

Judge Murrah: That's what I want to say, prescriptive accuracy.

The Witness: Yes, sir.

Judge Murrah: Thank you very much.

Judge Wallace: Let me ask you this question, Doctor: [fol. 476] What percentage of the glasses that you check that have come from the optician do you find wrong, do you have any idea?

The Witness: Your Honor, it's a very small percentage, actually, I think principally because I feel that I am dealing with very good opticians that are capable, and occasionally a patient will take a prescription and leave and they may imply they are going to one optician, and they will end up seeing a frame in another window and going some place else, and that makes it of added value to recheck, but fortunately I get very few errors, and they are courteous to make them good when they are called to their attention.

Judge Murrah: What is your name, please?

The Witness: Richard Clay.

Judge Murrah: Clay?

The Witness: Yes, sir.

Judge Vaught: Let me ask you this, Doctor: Do you find that optometrists and opticians and ophthalmologists all make a mistake sometimes?

The Witness: Yes, sir.

Judge Murrah: Anything further from this witness?

Mr. Daugherty: No further questions.

(Witness withdraws)

[fol. 477] F. T. STACKPOLE, called as a witness on behalf of the defendants, being of lawful age and having first been duly sworn, testified as follows:

Direct examination.

By Mr. Daugherty:

Q. State your name, please.
A. F. T. Stackpole.
Q. What is your profession, please?
A. Optometrist.
Q. How long have you been practicing optometry?
A. Since 1931.
Q. Are you a graduate of a school of optometry?
A. Northern Illinois College in Chicago.
Q. In what year did you graduate?
A. 1931.
Q. Will you state briefly, please, what your professional society membership amounts to?
A. What my membership amounts to?
Q. Yes, what professional organizations do you——
A. (Interposing) American Optometric Association and Oklahoma Optometric Association.
Q. Where is your office?
A. 416 and 18 Midwest Building.
Q. Doctor, do you as an optometrist engage in making [fol. 478] eye examinations?
A. Yes, sir.
Q. When you make an eye examination, what do you do next?
A. I write the prescription and send it to the laboratory.
Q. What kind of laboratory do you send the prescription to?
A. Send it to a wholesale supply house, I guess would be the proper term.
Q. What happens next, Doctor?
A. They compound the prescription, put it together and send it back to me.
Q. And then what do you do in the ordinary course of your practice?
A. I check the glasses to see that they are the same as ordered.

Q. Then what do you do?

A. Then I have the patient come in and I deliver the glasses to the patient.

Q. In delivering the glasses to the patient, what do you do, exactly?

A. I place the patient in the chair and check his vision to see that it is as it should be, and adjust the frame so that it fits his face comfortably, so it's straight, and lets him see through it the way I intend him to look through them.

Q. Do you ever find an instance of error in the supply house filling your prescription properly?

[fol. 479] A. Yes.

Q. About how often, Doctor?

A. That's hard to say. It varies. Sometimes I may go for several months without an error and sometimes I may have two or three in a week; seems to depend maybe on how busy they are in the supply houses.

Q. What do you do when you find an error?

A. I send the glasses back.

Q. Do you use a dispensing optician in your practice?

A. No.

Judge Vaught: I didn't get that.

Mr. Daugherty: Did he use a dispensing optician in his practice.

Judge Vaught: Do you use——

Mr. Daugherty: A dispensing optician.

Judge Vaught: Who selects the glasses, the frames, Doctor?

The Witness: The patient. When the patient is in the office after I make the examination, I have different types of frames and I let them select them from those.

Judge Vaught: You furnish the frames?

The Witness: No, sir, I don't furnish the frames. I merely have some samples, you might say, that I show them.

Judge Vaught: Where do you get the frames?

[fol. 480] The Witness: I get them from the different supply houses. There is a number of supply houses, manufacturers, and I try to select some that I think the people would like.

Judge Vaught: You charge the patient for the frame?

The Witness: I charge the patient for the complete pair

of glasses unless he asks for a breakdown; if he does, then I tell him what the lens cost and the frames cost and the examination.

Judge Vaught: Your price to the patient is for the examination, and the lens installed in the frames?

The Witness: That's right. If he has got a frame, of course there is no charge for the frame. We charge him for what we do for him, in other words.

By Mr. Daugherty:

Q. In your practice do you frequently examine patients and find that they do not need glasses?

A. Yes, it just happened this noon during the recess. I went down there, and a patient had come in from some little town in southwestern Oklahoma, we didn't fit him.

Q. What in your practice has been the frequency of your examinations where you find the patient does not in fact need glasses?

A. I'd say that happens at least five or six times a week minimum.

[fol. 481] Q. Doctor, when a patient comes to you for an examination or with the thought that he has defective vision, do you feel that the professional relationship is created between you and that patient?

A. Oh, certainly.

Q. Do you feel responsible for the full effect of what is undertaken to be done in connection with correcting eye vision?

A. Correct, very definitely.

Q. Do you share that with anyone else; do you feel that should be your own responsibility?

A. That's my own responsibility. That's the reason that I do check the glasses when they come back from the laboratory, because it is my responsibility.

Q. What supply houses do you use?

A. Well, the biggest part of the time I use the American Optical. Sometimes I give other supply houses some work, but normally it's American Optical.

Q. Do you use several houses?

A. I use several, yes.

Q. Doctor, are you familiar with this law which is involved in this litigation?

A. Yes, I believe so, as near as a layman can be.

Q. Do you feel that in the interest of public health and welfare that the solicitation of glasses should be made [fol. 482] through the medium of advertising?

A. I think that there should be no advertising connected with it in any way.

Q. Why?

A. Well, in the first place, lots of people who aren't—in other words, well, put it this way—a pair of glasses is a pair of glasses to them, and they may wander into a place that is absolutely merchandising, you might say, they are wandering into a place that the party that is running the business is trying to sell them a pair of glasses. It is not for the good of their eyes. It's a shame that places are open that they can wander into like that. They should go to a doctor that will examine their eyes and take good care of them without being enticed in by newspaper advertising or window displays or something like that.

Q. Do you feel a person in need of eye examination or eye care, or an examination for correcting his vision, should start in the doctor's office?

A. Most assuredly. Otherwise he'd never know whether he needed eye care.

Q. Do you feel that opticians should make rebates to you or any other man making an eye examination?

A. I misunderstood you.

Q. Do you feel that an optician should make rebates to you or——

[fol. 483] A. (Interposing) No, certainly not.

Q. Or any other type of eye——

Judge Vaught: (Interposing) Is there anything in the record to date to support that contention or theory?

Mr. Daugherty: I think not, your Honor. I am trying to make a record. I believe everybody is in accordance with that.

Mr. Woods: We certainly agree there should be no rebates or kick-backs, your Honor.

Judge Vaught: I don't think that's in controversy.

By Mr. Daugherty:

Q. Do you feel that eye examinations should be made by either ophthalmologists or optometrists in the employ of a commercial enterprise?

A. They should be made by a licensed operator, that is the ophthalmologist or the optometrist.

Q. Do you feel that a professional man making eye examinations should locate his office in the middle of a retail mercantile establishment?

A. Definitely not.

Judge Vaught: In the middle of what?

Mr. Daugherty: Retail merchandise establishment.

Judge Vaught: What kind of an advertisement, Doctor, would you say would be proper for the optometrist or the optician?

[fol. 484] The Witness: Your Honor, I——

Judge Vaught: (Interposing) Downtown office, say you had a downtown office now, Main Street, what kind of an advertisement would you approve that would indicate what kind of a business it was?

The Witness: I think we should use exactly the same kind of advertising as the legal profession or the medical profession use, possibly a card, if it's very dignified. It shouldn't be anything to entice a person in, any more than for the dentist or the medical doctor or the attorney.

Judge Vaught: Would you say that it's objectionable to have the name of the optometrist or the name of the optician on his window or his door?

The Witness: No, I don't think it would be objectionable if it's in good taste and small. I think if it's an enormous neon sign or something it isn't in every good taste and it shouldn't be. I think if it's small it would be absolutely all right.

Judge Vaught: In other words, you feel that one would have a right to let the public know that he was doing business at that place?

The Witness: Oh, I have my name on my door, up on the 4th floor. I thing everyone is entitled to let people know where they are. However, I think there is legitimate and [fol. 485] clean and ethical way of doing it, and there is a way that isn't.

Judge Vaught: Is your name down on the first floor?

The Witness: No, sir, it's on the 4th floor, on the entrance to my door, the office entrance.

Judge Vaught: Not the building?

The Witness: No.

Judge Murrah: It's on the directory?

The Witness: It's on the directory in the lobby, yes, with every office, yes.

Judge Murrah: I thought——

The Witness: (Interposing) I misunderstood that was the question.

By Mr. Daugherty:

Q. Doctor, may I ask if in your opinion the preferable procedure, if it's desired to duplicate a set of glasses what that procedure would be.

A. You mean if someone came to me that wanted to duplicate a pair of glasses, is that it, or possibly——

Q. The most preferable way of——

A. (Interposing) Duplicating a set of glasses?

Q. Yes.

A. They should have a prescription by the doctor, or copy of it.

[fol. 486] Q. Is it preferable to duplicate from a prescription over duplicating from the glasses themselves?

A. Yes.

Q. Will you state why, please?

A. Well, the prescription is the original intent of the doctor. It's the way he wrote it and the way he intended for it to be filled, and when it's taken from the glasses there is always the possibility of error.

Q. How may that error come about?

A. Well, through mechanical means or through error in the operator that's operating the mechanical means. Just to clear myself on this thing, if you don't mind, can I say a few things, just a little? I went down to American Optical Company this morning, just curiosity, because I didn't know just how they did operate, and thought I would check, and they use a lensometer twice on each operation, when the lens are put, what they call set up, and after the glasses are finished, and the manager down there told me

they also had a third lensometer, so if anything went wrong wth the other two they would have an emergency one.

Q. Do they use two operators?

A. They use two operators with two lensometers on every pair of glasses. The third they use in case of variation between the two, so they can check.

Q. Is each lens checked by both operators on both lens-
[fol. 487] ometers?

A. That's right.

Q. Are there any other reasons why it may be dangerous in that an ill fitted pair of glasses may be furnished through a duplication from the glasses themselves on the lensometer?

A. Well, after all, when a person goes to have his eyes examined, he expects the best, and that's what he wants; he wants it as near prescription as he can get it, and if the glasses are improperly fitted, he is going to go right back into where he was when he came in; he's not properly corrected, he's partially corrected—and it's our desire to try to give everyone the best that we can.

Q. Might somebody produce a fragment for duplication which would be of inadequate size to permit a proper duplication?

A. No, you couldn't. You would have to have a large enough part of that lens to be able to determine the optical center, the geometric center of the lens.

Q. If someone didn't have that much of a fragment, but did undertake to 'uplicate, would the result be a matter of considerable guesswork?

A. It would be about 80% guesswork.

Q. Doctor, among your specialties do you also do contact lens work?

A. That's right.

[fol. 488] Q. You do that in connection with, along with your optometry work?

A. That's right.

Judge Vaught: I didn't get your question.

Mr. Daugherty: The contact lens work, that's the lens that's fitted inside the eyelids. He specializes in that work, too.

Mr. Daugherty: That's all. Thank you, Doctor.

Cross-examination.

By Mr. Woods:

Q. Dr. Stackpole, when you have examined a person's eyes and prescribed glasses, do you give or will you give your prescription to that person?

A. If the person asks me for the prescription, I give it to him. He is welcome to it at any time.

Q. And that's the practice you follow, that whenever your patient asks you for the prescription you give it to that patient?

A. I will give it to the patient.

Q. Then leave it to him to have filled wherever he wants to?

A. No, no; I usually, because I do want to check that work myself, maybe I'm a little conceited, but I have confidence in my own work—I like to check those glasses and be sure they are what I ordered. What I meant by giving a man a prescription, is that if you were going back to Kansas [fol. 489] City and I had had the pleasure of examining you and you said, "Maybe I get back and break my glasses", I'll give you the prescription and you can carry that in your purse any time you want to duplicate you can do it without having to take these pieces in that we were talking about.

Q. But is that the only type of situation where you give, in your practice, your patient the prescription?

A. That's the only time my patients ever ask for it.

Judge Vaught: In other words, you fill your own prescriptions?

The Witness: No, I order the glasses from a laboratory but I deliver the glasses. I mean I send the prescription to the supply house, they send the glasses back to me and then I deliver the glasses.

Judge Vaught: You provide the frame and install the glasses?

The Witness: No, I don't provide the frame, no laboratory; I have no frames other than a few samples in my office. I order the glasses complete, frame and all, see, from the laboratory, and they return them to me and then I deliver them to the patient.

Judge Murrah: They return them to you completely fabricated?

The Witness: Yes, that's right.

[fol. 490] Judge Vaught: How does the patient know what kind of frame he wants?

The Witness: I have frames in the office.

Judge Vaught: You have frames?

The Witness: I have samples there, yes, that he selects from. However, they are samples that are not for sale. It is not a stock.

By Mr. Woods:

Q. In connection with your direct testimony, you mentioned, I believe that duplications of eyeglasses, eyeglass lenses should be done by prescription; do you ever issue prescriptions to persons who request them so they can have their glasses duplicated?

A. Yes, sir, that's what I said. In case I had examined you and you went to Kansas City, asked me for the prescription—I don't ask the patient if he wants it, but if they say, "Well, I'm leaving town and I'd like to have the prescription in case I break my glasses", I will give them the prescription, they can carry it with them so they won't be running the hazard of having them duplicated by someone from these pieces.

Q. And that's when you give out your prescription?

A. That's the only time.

Q. You are familiar with the terms used in optometry and in the trade, are you not?

[fol. 491] A. I hope so.

Q. What does the term "optical supplier" mean in the trade?

A. Well, the optical supplier is the, you might say the manufacturer.

Q. Well, you mentioned you sent your glasses to A. O., that's the optical supply?

A. That's American Optical Company, yes, sir.

Q. That's an optical supplier, is it?

A. Yes.

Q. When you examine a patient as you testified on direct

examination and do not prescribe glasses, what fee, what customary fee do you charge, Doctor?

A. Well, it depends on how much time I have taken. I charge from $5.00 to $7.50 up to $25.00 on contact lenses.

Q. But now let's exclude contact lenses. Those are the lenses that fit right over the eye.

A. Well, it would run probably $5.00 to $7.50.

Q. Is it not true that in Oklahoma City the majority of the optometrists have their offices on ground floor locations?

A. The majority, you say?

Q. Yes, sir.

A. I believe that the majority of the optometrists and the medical men both do.

Q. Yes, but that's true of the optometrists?

A. Yes.

[fol. 492] Q. And is it not true that those locations are generally in retail business areas?

A. I don't believe so; I don't believe so.

Q. Aren't they either in the downtown area, like—you are familiar with Dr. Wilk, are you not?

A. What——?

Q. You know Dr. Wilk, do you not?

A. Yes, uh huh.

Q. Aren't they either in the downtown area, similar to the example of Dr. Wilk, or out in the suburban shopping areas?

A. Well, there's zoning laws that require them to be in business areas.

Q. The zoning laws don't require them to be on the ground floor, do they?

A. No.

Q. You are not opposed to the opticians, dispensing opticians advertising, are you?

A. Yes, I don't believe they should.

Q. Don't think they should advertise in any manner, way, shape or form?

A. Any way other than an ethical way.

Q. All right, what do you mean by an ethical way for an optician?

A. There's one ad in the phone directory says, "Get your Be-bop Glasses Here".

[fol. 493] Q. What?

A. Be-bop glasses.

Q. Well, what you mean is that you are opposed to misleading or fraudulent advertising, is that not right?

A. Misleading or fraudulent or advertising that was designed by someone for eyecatching appeal, I mean enormous size or such as that.

Q. Do you believe optometrists should advertise in telephone directories?

A. By advertising you mean have their listing on the yellow page?

Q. Yes.

A. Yes, surely they should.

Q. In your opinion if there is anything more than simply a man's name in the classified section of the telephone advertising, I am speaking of the optometrist, would you consider that advertising?

A. Not if he has a specialty in optometry, as for example orthoptics or contact lens.

Q. You mean that in your opinion it's perfectly all right for an optometrist in the yellow classified section of a telephone directory to put in the various types of work he does?

A. If it's in his professional work, yes, I think it's all right.

Q. And would you include in that the phrase, "complete eye care", or something of that nature?

[fol. 494] A. I think that's all right.

Mr. Woods: That's all, thank you.

Judge Murrah: May I ask you just a question to clarify a point in my mind in connection with your testimony. I have in my hand a pair of glasses that was prescribed for me and filled on a prescription by an optician. Suppose I take these glasses to your office and say, "Doctor, I want you to duplicate these lens." What would you do?

The Witness: I would check the power of the lens and possibly if it was a very complicated lens, it would depend on how complicated, I might even put you in the chair and run a little check to see if they were right.

Judge Murrah: Suppose I tell you I don't want a check. I want you to duplicate these glasses for me. These glasses just suit me. They are just exactly what I want, and I

don't want to pay for an examination. I just want to duplicate these lens. What would you do?

The Witness: I would find what the power is, and the optical center. I have an instrument that will find that.

Judge Murrah: What is the name of that?

The Witness: This is a decentering device made for that purpose.

Judge Murrah: Will you use the lensometer?

The Witness: No, I would not. I don't have a lensome-
[fol. 495] ter.

Judge Murrah: You don't use one?

The Witness: No.

Judge Murrah: Are you familiar with them?

The Witness: Yes, that is after a fashion.

Judge Murrah: Well, they are an accepted device for measuring the power of glasses?

The Witness: That's right.

Judge Murrah: And accepted in your profession as well as others?

The Witness: That's right. There is always a possibility of the thing becoming out of adjustment.

Judge Murrah: Whatever device you use it would be a mechanical instrument?

The Witness: That's correct; yes, if you didn't have the prescription.

Judge Murrah: You would use whatever mechanical device you now have in your office for measuring the power of these glasses?

The Witness: That's right.

Judge Murrah: And with that mechanical device, you would measure, determine the power of these glasses?

The Witness: That's right.

Judge Murrah: The axis of them and the spherical——

The Witness: The center and all.

[fol. 496] Judge Murrah: The center, I am trying to say.

The Witness: Uh huh.

Judge Murrah: And from that you would make me a pair of glasses, duplicate to these?

The Witness: I believe so, your Honor, here though——

Judge Murrah: Beg pardon. Well, all right.

The Witness: Here is what I was going to say. I believe I could, I believe that a world of opticians could. However,

at the present time there is nothing to keep my seventeen year old daughter from getting a pair of pliers and a neon sign and a bunch of frames and becoming a dispensing optician, and I don't——

Judge Murrah: (Interposing) I'm not asking you that. I am asking you about——

The Witness: (Interposing) Yes, they definitely could be.

Judge Murrah: These glasses?

The Witness: That's right.

Judge Murrah: And when you did by mechanical means in your office without examining my eyes duplicate these glasses and gave them to me, you would feel that you had performed a professional service?

The Witness: I believe so, yes.

Judge Murrah: Satisfactory to you?

[fol. 497] The Witness: That's right.

Judge Murrah: As a professional man.

The Witness: Yes.

Judge Murrah: And that you had rendered a satisfactory service to your patient?

The Witness: That's right.

Judge Murrah: Or your customer, as the case may be.

The Witness: That's right.

Judge Murrah: Now, do you do that sometimes?

The Witness: Very seldom. As I say, I am located on the 4th floor and very few people wander, no one wanders in there. They all come——

Judge Murrah: (Interposing) But the average, would you feel the optician on the ground floor who maintains a shop and had a lensometer or any other mechanical device that's known to you that's used for the purpose of measuring the power of glasses, could I go in to him, to one of your profession and say, as I have said to you here, "Doctor, I want you to duplicate these glasses. I just want another pair of glasses just like these." That's not an uncommon thing.

The Witness: No.

Judge Murrah: I have lost these and I ought to have two or three pairs and I would if I could afford them. These [fol. 498] glasses are comfortable, I read extensively, and I don't want them any different. Do you think you could

duplicate these glasses by your mechanical device to my satisfaction, and your satisfaction?

The Witness: I think so. If the man is trained I think he can, but as I said a moment ago there is nothing now to assure that the man is trained.

Judge Murrah: Well, it might not be. All right, could any qualified optician do that?

The Witness: If he is qualified, yes.

Judge Murrah: We have to assume that he is qualified; could any qualified optician do that?

The Witness: I think any qualified optician surely could.

Judge Murrah: Well, now, an ophthalmologist who just preceded you on the witness stand said that his office technician did it. Would you accept that?

The Witness: I believe that the office technician probably is better able to do that than some of the opticians because she is working in that office and he has probably instructed her very explicitly as to how it should be done, and I am sure that he has trained her.

Judge Murrah: Would you also be willing to say that probably that the office technician could do a better job than some optometrists?

[fol. 429] The Witness: No, I don't believe so.

Mr. Woods: No further questions.

Redirect examination.

By Mr. Daugherty:

Q. Would you prefer in the case that Judge Murrah has just given you to duplicate on his prescription rather than on the glasses themselves?

A. Definitely it should always be done. I intended to put that in there a second ago, that I really believe—now that's what I do myself; and I suppose there would be some doubt in the minds of some of them, but in a case like that, if there is any doubt about it, being a very complex correction or anything like that, I just say, "You had better go back to the doctor who fitted you." In the first place I don't know why you would be coming to me. He ought to go back to that man anyway, and I would just tell him to go back to the man that fitted him.

Judge Murrah: Well, in that connection, as I understood Dr. Clay, I believe his name is, an ophthalmologist, testified to the effect that he would issue a prescription which would be filled, and the patient would return to the office with the prescription, and that his technician ordinarily and customarily checked that prescription, those glasses, rather, against the prescription by use of a lensometer, that that was the accepted practice, and from that I understood that [fol. 500] to mean that the lensometer was an acceptable device for determining the visual accuracy of a pair of glasses which had been fabricated pursuant to a prescription.

The Witness: Probably is the most accurate.

Judge Murrah: That's all.

Mr. Woods: No questions.

Mr. Daugherty: Do you have anything further to add?

The Witness: I was going to say that this instrument has to be operated by someone that knows how to operate it, too. I mean the instrument is—the thing that I wonder about this so many times is that anyone can start being an optician tomorrow. There is nothing to keep them from being an optician, and they can be good or they can be bad. There is no doubt in my mind that there is a very definite place for opticians, but they should be trained and qualified and not just turned loose by a bunch of merchandisers that are interested in the dollar rather than the—they just see a new business and they would like to get into it.

Judge Murrah: Well now, we have had testimony from ophthalmologists here to the effect that an optician was a necessary, essential part of their practice, that they couldn't practice without them or wouldn't, certainly should not like to do so, and that they had no difficulty in having their [fol. 501] prescriptions filled by competent opticians. Do you agree with that?

The Witness: I agree with that, but there may be one for every three that aren't competent. The layman doesn't know about that, and he wanders in and he's sent to someone that maybe isn't qualified, see.

Judge Murrah: Do we understand you to testify, Doctor—we are just trying to get to the bottom of this case——

The Witness: Yes, absolutely.

Judge Murrah: Do we understand you to testify that

you would not trust an optician to fill your prescriptions and you trust no one except yourself?

The Witness: No, your Honor. I would trust some opticians. However, I feel that as long as I made the examination and that it's a doctor-patient relationship, that it's my duty to carry that thing on through and complete the service and know it's right myself. I mean without any if or ands about it. That's just the way I believe in doing it.

Judge Murrah: That's just a part of the code of your profession, that's the way that you practice your profession, and it's an attitude that you take?

The Witness: That's right.

Judge Murrah: I'm not critical of it.

The Witness: No.

[fol. 502] Judge Murrah: The Court doesn't mean to criticize it, but there are ophthalmologists, in that branch of the field of visual care, who do very readily and with complete confidence trust the optician to fill his prescriptions?

The Witness: Surely.

Judge Murrah: And when the prescriptions are filled and returned to his office, he checks the glass against the prescription by use of a lensometer, and that function is performed by his technician, usually, and they feel that in that manner his patient receives adequate and careful care.

The Witness: If it's handled that way it's absolutely all right, but I believe that you will find most of them don't have the glasses brought back to the office.

Judge Wallace: Most of the ophthalmologists?

The Witness: That's the ophthalmologists.

Judge Wallace: Now you are familiar with the decision of the Supreme Court of the United States that this referable business is no longer legal?

The Witness: That's right.

Judge Wallace: Now according to your theory, the doctors should determine who the optician should be, because you say that so many opticians, that two out of three are incapable of properly handling this matter.

The Witness: No, if I said two out of three, I meant to [fol. 503] say possibly one out of three. There is no way of knowing. I am sure there are lots of them that are very capable, but I also know and a man with his eyes open, a

little observation can see, that there are some of them that aren't. I think that the doctor owes to his patient to at least give him a list of two or three of those that are qualified and competent, instead of just turning him loose, and also feel that he should—whether he does or not—I feel that he should check the glasses on the patient sometime later and see that they are what he ordered.

Judge Murrah: Just for your information, one very competent witness, a witness whose competency, I dare say, could not be questioned, testified that he seldom required his patients to return for a check. I understand your testimony is to the effect that you think he should do that.

The Witness: That's a personal opinion. I like to give that kind of service myself and know what they are getting.

Judge Murrah: That's all right. That's all.

Judge Wallace: How do you check yours; you do not have this lensometer that they are talking about.

The Witness: I neutralize them. I have this centering device that's used in laboratories for centering a lens.

Judge Wallace: You consider that as good as the lens-
[fol. 504] ometer?

The Witness: What?

Judge Wallace: Do you consider that as comparable to the lensometer?

The Witness: After twenty-some years, yes.

Judge Wallace: The ordinary practitioner then wouldn't know how to do that; you would have to have the experience that you have had?

The Witness: Yes, I believe that's right.

Judge Wallace: Otherwise the lensometer would be preferable?

The Witness: It would be easier. It wouldn't take as long to do. It's a lot easier.

Judge Murrah: And just as accurate?

The Witness: Well, the lens that I neutralize with will never change, the lensometer might; but I am not going to argue about how that machine can get out of——

Judge Murrah: (Interposing) You don't doubt the accuracy of the lensometer?

The Witness: No. I know that it's possible for it to get out. I know that the lens that I neutralize with will never

get out because they are ground and they are going to stay that way, but that's a minor point.

Judge Murrah: I see. Thank you, Doctor.

[fol. 505] Recross-examination.

By Mr. Woods:

Q. By your neutralizing process, you use what is known as a trial case?

A. That's right.

Q. And that's a series of gound lenses of predetermined strength?

A. Yes.

Mr. Woods: That's all.

Mr. Daugherty: That's all. Thank you.

Judge Murrah: You are excused.

(Witness withdraws.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Daugherty: If the Court please, we have one other witness, but in the hope that we can get through today, which will probably meet with the approval of the Court, I believe we will rest our case at this time.

Judge Murrah: You are perfectly free to.

Mr. Daugherty: I know that, your Honor. The testimony of this other witness would be cumulative to what you already have.

Judge Murrah: Well, I think that you have undoubtedly covered the field, that is it would seem to the Court that you have. You know more about that, whether you have. Do you think the Court has a pretty clear picture, of the whole case, of both sides? Of course you would like to go [fol. 506] into the background a little more, I suppose?

Mr. Woods: Yes, your Honor.

Judge Murrah: Anything further?

Mr. Daugherty: We have nothing further.

Mr. Woods: We have nothing further, your Honors.

Judge Murrah: Now what is your pleasure about argument and briefs, and what is indicated in the case? Would

you prefer to argue the case now? I'm not sure that I speak for my co-counsel——

Mr. Woods: I understand, your Honor.

Judge Murrah: But I would prefer if you are going to argue the case and you want to brief it further in the light of the testimony that is introduced, I would prefer to have it briefed and then argument, pursuant to which we would render a decision very quickly.

Mr. Woods: That would be quite acceptable to us, your Honor.

Judge Murrah: If you would like to argue it now—I have always felt an oral argument and then brief, it of course it's not very helpful.

Mr. Woods: Yes, your Honor.

Judge Murrah: In a situation like this.

Mr. Woods: I would think in this type of situation the best way to handle it is to brief it and argue after those briefs have been submitted.

[fol. 507] Judge Murrah: I have in mind—I will confer with my associates in just a moment—but I have in mind that we have a rather, what we might say, kind of a different lawsuit here that's taken shape today, and I assume that your approach would be somewhat different in view of the concessions made by the State today.

Mr. Woods: Yes, sir.

Judge Murrah: And so you will want to have those pleadings which have not been filed, I understand, that will be amended—and you are granted leave now to amend the pleadings.

Mr. Hansen: Yes, sir.

Judge Murrah: I am sure you understand the nature of them and you would have no objection to that.

Mr. Woods: That's correct, your Honor.

Judge Murrah: How much time do you want to amend your pleadings, just a few days?

Mr. Hansen: I think I can file it tomorrow.

Mr. Duvall: We would like to argue the case after the brief.

Mr. Woods: After briefing it, your Honor.

Judge Murrah: Do you insist upon it?

Mr. Woods: Well, I always prefer it if I could to orally argue a matter. I don't think it would require a great deal

of time, but at the same time I know it's helpful for a [fol. 508] lawyer to get to argue.

Judge Murrah: Surely. We understand that, too.

Judge Vaught: How much time do you want to file your brief?

Mr. Woods: If your Honor please, I would like at least to have a chance to see some of the transcript of this testimony. Once we have that we can file our brief rather promptly, I would say.

(There was a brief discussion re the transcript, whether or not all of it would be required and what time it would be available, the reporter estimating two weeks from this time for its delivery, and the plaintiffs were given fifteen days from the time of delivery of transcript for brief and the defendants given fifteen days after the filing of the plaintiffs' brief for answer brief; and upon request Mr. Hansen's time for filing his amended answer was extended from tomorrow to five days, upon which latter point Judge Vaught stated: "Five or ten days, whatever you need on that"; and Mr. Hansen, upon inquiry, was informed by Judge Murrah that if he found it necessary to make some change in response to pleadings he might have permission to do that.)

Mr. Woods: One thing more I want to bring up to the Court, and that is, may this restraining order be continued until the case is submitted?

Judge Murrah: Yes; you agree to that?

[fol. 509] Mr. Hansen: Perfectly satisfactory.

Judge Murrah: Now then, the order then is, I think that in view of what Mr. Reporter has stated, that at this particular stage we can be safe in giving you thirty days from this date to file your brief.

Mr. Woods: Very well, your Honor.

Judge Murrah: If for some reason the reporter doesn't get the transcript to you within the time that he has indicated here, you will let us know and we will extend that. You would have fifteen days after that.

Mr. Hansen: Perfectly satisfactory.

Judge Murrah: To file that, so it will be thirty, fifteen and five.

Mr. Woods: Thank you, your Honor.

(There was a brief discussion of the time argument would be set.)

Mr. Woods: One more thing, in connection with the remarks that you made to me about the background material, I wonder if I might have leave to submit a brief that I have prepared on the admissibility of such type documents, just for the Court to consider? I didn't want to take the time to argue that at great length this morning.

Judge Wallace: Yes, sir.

Judge Murrah: I may be in the minority in that respect anyway, and I may have held you too close.

[fol. 510] Mr. Woods: I wanted permission to submit my authorities.

Judge Vaught: Submit it in your brief.

Judge Wallace: Just a minute, if you want to get those in the record, why don't you offer them and let the other party object, and the Court sustain your objection; that way you have got them in.

Judge Murrah: You didn't offer them after my lecture to you?

Mr. Woods: No, sir, I did not.

Judge Murrah: Well, I didn't mean to deprive you of the right to make the record, so you offer them.

Mr. Woods: I had thought the Court had already ruled on them, but at this time the plaintiffs will offer Exhibits 2 through 12 inclusive and 16, for the purpose of establishing this background for the constitutional question in this litigation, and not for the truth of what is contained in those but purely for background material.

Judge Murrah: Now very well. Your objection will be sustained without prejudice to the right to argue as to the admissibility of it in your brief.

Mr. Woods: Very well.

Judge Murrah: And if it develops, if we decide that part of it or any part of it is admissible, you are not being prejudiced, no one is being prejudiced by the admission [fols. 511-513] at the time of argument.

Mr. Woods: The Clerk has those exhibits.

Judge Murrah: What we have in mind, or what I have in

mind is simply that just a statement by someone, profes-sional statement, is not rendered admissible because it does so through some journal. I think that's the law.

Mr. Woods: Hearsay, I grant you that.

Judge Murrah: All right, that's all?

Mr. Woods: That's all.

Judge Murrah: Great pleasure to have you. Well tried The Court will recess subject to call.

(Whereupon the proceedings in the heretofore styled and entitled cause were adjourned.)

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 514] In the United States District Court

[Title omitted.]

Deposition—October 15, 1953

[fol. 515] Dr. Arthur M. Culler, called as a witness on behalf of the plaintiffs, having been first duly sworn on oath, deposeth and saith as follows:

Direct examination.

By Mr. Phillips:

Q. Will you state your name, please?

A. Arthur M. Culler.

Q. Will you state your profession or occupation, Doctor

A. I am an ophthalmologist.

Q. Are you connected with any university?

A. Yes.

Q. Will you state what university, sir?

A. Ohio State University.

Q. Are you connected with the Medical Department of the Ohio State University?

A. I am chairman of the Department of Ophthalmology in the Medical School.

Q. Will you state the degrees you hold, sir, and the colleges or universities which you attended?

A. A.B. and M.D., University of Michigan.

Q. Will you state the professional associations of which you are a member?

[fol. 516] A. Well, American Ophthalmological Society, American Medical Association, American Academy of Ophthalmology and Otolaryngology.

Mr. Daugherty: Doctor, will you talk a little louder? We cannot quite hear you over here.

The Witness: Association for Research.

Mr. Phillips: Q. Are you an officer or member of any committees of those associations, sir?

A. Yes, I am a member of the Joint Committee of Optics and Visual Physiology, and chairman of the National Interprofessional Committee on Eye Care. I am a member of the Armed Forces Committee of the Academy.

Q. All right, sir. Are you familiar with the general field of the practice of ophthalmologists and the general methods which they employ in such practice?

A. Yes.

Q. Do ophthalmologists prescribe eye glasses?

A. Yes.

Q. What does the prescription of an ophthalmologist ordinarily contain, sir?

A. Most ophthalmologists only write prescriptions giving the data in regard to the lens required.

[fol. 517] Q. The prescription does not contain data respecting the frame?

A. That is right.

Q. Does it contain data respecting the fitting of the eye glass or the frame to the face?

A. Ordinarily not.

Q. Are you familiar with the general field of practice of optometrists?

A. In a general way, yes.

Q. Go ahead, sir.

A. May I revise that and say yes.

Q. Do the optometrists prescribe eye glasses, or lenses, sir?

A. Eye glasses.

Q. Eye glasses?

A. Yes.

Q. Does the prescription of optometrists contain ordinarily a prescription for lenses?

A. The usual practice among optometrists is to dispense glasses, though some of them write prescriptions.

Q. The usual practice is to dispense their own eye glasses?

A. Right.

Q. Are you familiar with the services generally per[fol. 518] formed by opticians?

A. Yes.

Q. Will you describe those services, sir?

A. Dispensing opticians fill prescriptions for eye glasses.

Q. Does the filling of the prescription for eye glasses include the grinding of the lens?

A. Yes, ordinarily.

Q. What activity with respect to the lens does the dispensing optician undertake, sir?

A. Most dispensing opticians don't have surfacing shops. They obtain lenses ground to prescription from wholesale houses, edge the lenses, mount them in mountings, and fit those to the patient.

Q. When you say fit——

A. Now I am taking these up backwards because actually the position of the lens in front of the eye is an important thing, and perhaps the most important service that they render is a matter of deciding how the lenses should be ground so that they will be centered properly in front of the patient.

For instance a frame, particularly these modern frames often are made to look right on the face, but it takes a considerable skill to position a lens properly in front of the [fol. 519] eye in those frames.

Q. In positioning the lens in front of the eye you mean fitting the frame to the face of a patient?

A. No. The point I was trying to make is that very often the center of the lens——

Q. Yes?

A. ——if those were just assembled in a factory and sent out, as happens in industrial setups, often you buy

things wholesale and they are just shipped out and given to the people, well those lenses have very little prospect of being centered properly for the eye.

Q. So it is the duty of the optician to see that the lens is centered properly to the eye?

A. To see that it is made properly so that it is centered when it is dispensed.

Q. Is it the duty of the optician to adjust the bridges?

A. Yes.

Q. The pads?

A. Yes, that is right.

Q. And the temples of the frames so as to fit the face of the patient?

A. Yes.

[fol. 520] Q. Is the performance of these duties by opticians an act of apparently recent origin, or is it a traditional field of activity?

A. It is a field much older than optometry.

Q. State whether or not in your opinion an optician must have the training and educational background of an ophthalmologist in order to perform the services which you have just described.

A. It is not necessary for an optician to have training in the examination of eyes. I think in many ways it is desirable that they do not have such training.

Q. In your opinion, sir, is the function of the optician in performing these services the function of a semi-professional or skilled craftsman?

A. Exactly.

Mr. Daugherty: I didn't get the answer to that.

Mr. Phillips: Exactly.

The Witness: Exactly.

Mr. Daugherty: Which one? Skilled craftsman or semi-professional man?

The Witness: Skilled craftsman.

Mr. Phillips: Skilled craftsman.

Q. Doctor, state whether or not in your opinion the opti-[fol. 521] cian in order to perform these services must have the training and educational background of an optometrist in order competently to perform the services you described.

By that, sir, I mean all of the training and educational background which the optometrist is required to have.

A. No, I believe that it is not necessary or even desirable for opticians to be trained in the examination of the eyes.

Q. Sir, from your experience in the instruction of ophthalmologists what would be your opinion with respect to the qualifications of the ordinary ophthalmologist to perform the skilled crafts and services which you have described as being performed by opticians?

A. I am sorry, sir, I didn't get that.

Mr. Phillips: Will you read the question to him?

(Question read by the reporter.)

The Witness:

A. Well in general ophthalmologists should know the essential points of dispensing opticianry, but as regards experence and skill in accomplishing the results, ophthalmologists never acquire that, and I think very few of us [fol. 522] would have the patience to do it properly.

Mr. Phillips:

Q. And if I understand you correctly, sir, is it your opinion that the ophthalmologist should understand the principles involved?

A. That is right.

Mr. Phillips: I believe that is all the questions I have. Go ahead.

Mr. Daugherty: Off the record.

(Discussion outside the record.)

(Deposition resumed at 1:55 o'clock P.M.)

Mr. Phillips: Let the record show that Dr. Culler is here under subpoena and is not voluntarily appearing on behalf of any party to the lawsuit.

Mr. Daugherty: Of course he is appearing pursuant to your subpoena.

Mr. Phillips: Yes. I inserted the word voluntarily.

Mr. Daugherty: I think perhaps that the record should show that it is now five minutes until two o'clock, and the doctor has to catch a limousine for the airport at 2:20, so I will necessarily cooperate to that extent.

[fol. 523] Cross-examination.

By Mr. Daugherty:

Q. Doctor, are you familiar with the litigation involved in this lawsuit in which you are testifying?

A. Unfortunately only by hearsay.

Q. Have you read the law involved in this lawsuit?

A. No, I haven't.

Q. Has anybody attempted to explain it to you?

A. Yes, I heard a little about it.

Q. Has it been represented to you by anybody that this law attempts to put the dispensing optician out of business in Oklahoma?

A. No.

Q. You are not laboring under that impression then at this time?

A. No.

Mr. Phillips: You answered "No," Doctor?

The Witness: I answered no.

Mr. Daugherty: I believe in view of the doctor's need to leave, that I will not ask him to read the bill.

Q. But if you don't mind, Doctor, I might like to ask you your opinion, your professional opinion as an expert in the field of human vision, as an ophthalmologist, what you think [fol. 524] about certain things that might be the subject of legislation, in the public interest and for the public health and welfare.

First let me ask you if in your opinion anyone is qualified to make an eye examination other than regularly licensed ophthalmologists or physicians or optometrists. Is there any other profession in your opinion qualified to make an eye examination?

A. No.

Q. Or refraction?

A. No.

Q. You think it is for the public good that a law might require that no unqualified person should be permitted to visually correct the eyes of another?

A. Yes, I agree with that.

Q. You think that is for the protection of the public, to see that they get good eye care.

Is it your opinion, Doctor, that an ophthalmologist or optometrist might issue a prescription which can be delivered to an optical supplier or dispenser to fill? Is there anything wrong with that provision in the law?

A. As these fields are generally understood in the United States, and as we train people for these fields, there are [fol. 525] three necessary fields in the care of the nation's eyes, ophthalmology and optometry and opticianry. They are inter-related and sometimes overlapping fields. They are all necessary.

Q. Then this law has no bad effect on the public if it permits an ophthalmologist or optometrist to issue a prescription to an optician to fill?

A. This law has no bad effect on the public if it doesn't restrict the dispensing unnecessarily and create hardships in that respect.

It is my impression from hearsay that the law in its present form does limit the activities of the dispensing optician so that he can't provide the best service.

Q. Well my question was is there anything wrong in making it legal for an ophthalmologist or an optometrist to make an examination and then write a prescription and send it to an optician to fill. Is that all right?

A. Yes, that is all right.

Q. That is the usual practice, is it not?

A. That is the usual practice.

Q. For the ophthalmologist. What I am trying to put [fol. 526] over to you, Doctor, is that this law permits that procedure.

A. Yes.

Q. And I just wanted your opinion if that procedure is satisfactory, in your professional opinion.

A. Yes.

Q. Do you feel that eye examinations should be conducted by ophthalmologists and optometrists on a professional basis with professional responsibility?

A. Yes.

Q. You don't advertise your services of course, do you, Doctor?

A. No.

Q. May I ask are you a practitioner as well as an instructor?

A. Yes.

Q. Do you feel that ophthalmologists or optometrists should receive rebates or kickbacks from opticians?

A. No.

Q. Do you think that ophthalmologists or optometrists should permit opticians or anyone else to solicit business for them?

A. By advertising?

Q. By advertising or any other method.

[fol. 527] A. If you mean by that should an optician be restricted from advising friends——

Q. I don't mean that.

A. ——in regard to qualified men, I think that is one of the natural rights.

Q. It is a necessity in a profession, I realize that, Doctor. We have it in the law as well as you have it in medicine. If people don't send their friends to us so that we can help them, we don't get clients and you don't get patients. But I think perhaps I should tell you what the word solicitation means. I think the impact of it rather means an active going out after people and taking them in to somebody to get a certain piece of work done.

A. Yes.

Q. And in the sense of professionalism do you feel that professional people should use solicitors for business?

A. I am against all forms of advertising and solicitation in regard to the care of the eyes.

Q. Do you feel that eye examinations should be conducted on a professional basis rather than on a commercial basis?

A. Yes.

[fol. 528] Q. Do you think it is a law in the public interest to prohibit ophthalmologists or optometrists from making

eye examinations as an employee of any lay group or lay body or commercial interest or commercial enterprise, but rather that they should be limited to making eye examinations as professional men?

A. Yes, I agree to that.

Q. Do you believe any and all measures of legislation which tend to keep eye examinations on a professional basis rather than on a commercial basis is good legislation for the public health and welfare?

A. Yes.

Mr. Daugherty: Do you have any questions?

Mr. Harkin: No. That is all, Doctor.

Mr. Phillips: Now you have the right, Doctor, to read this deposition and sign it before it is submitted to the court, or you may waive that right, in which event the court reporter will forward it immediately.

Do you desire to read and sign your deposition?

The Witness: No, I think that you won't get the sense of anything wrong. I didn't make any very complicated answers.

(Signature waived.)

[fols. 529-532] Certificate of Notary Public to Deposition (omitted in printing).

[fol. 533] In the United States District Court

[Title omitted]

Deposition—October 15, 1953

[fol. 534] Dr. Frederick C. Cordes, called as a witness on behalf of the plaintiffs, having been first duly sworn on oath, deposeth and saith as follows:

Direct examination.

By Mr. Phillips:

Q. Will you state your name?

A. Frederick C. Cordes.

Q. Will you state your profession or occupation?

A. I am an ophthalmologist.

Q. Dr. Cordes, will you state the degrees you hold?

A. I hold an A.B. and an M.D. at the University of California.

Q. Dr. Cordes, are you associated with any university at this time?

A. I am the chairman of ophthalmology at the University of California at the Medical School.

Q. Dr. Cordes, are you a member or officer of any professional societies?

A. Yes, I am.

Q. Will you state the offices you hold and the societies of which you are a member?

[fol. 535] A. I am the president of the American Academy of Ophthalmology and Otolaryngology.

You don't want all the societies, do you?

Q. Just the most important ones, sir.

A. A member of the American Ophthalmological Society, a member of the Section on Ophthalmology of the American Medical Association, a member of the Association for Research and Ophthalmology, a member and past president of the Pacific Coast Otolaryngological Society, and a fellow of the American College of Surgeons.

Q. As head of the Department of Ophthalmology of the University of California are you familiar with the general field and methods of practice of ophthalmologists?

A. I am.

Q. Do ophthalmologists prescribe lenses for eye glasses?

A. At this point I would like to have it clearly understood that in testifying this morning that I am not doing it of my own free will for the defendant, but merely because I have been subpoenaed.

Q. Or the plaintiff, sir.

A. Or the plaintiff.

[fol. 536] Q. All right, sir.

Mr. Branton: Either one.

The Witness: Or the plaintiff, that is right.

Mr. Phillips: That is right.

The Witness: But only because I have been subpoenaed.

Mr. Phillips: Let the record show that Dr. Cordes is

here under subpoena and not voluntarily, and appearing as a witness on behalf of either the plaintiff or the defendants in this action.

Mr. Branton: Now will you state the question again to him?

Mr. Phillips: Will you repeat the question to him?

(Question read by the reporter as follows:

"Q. Do ophthalmologists prescribe lenses for eye glasses?")

The Witness: A. Yes, they do.

Mr. Phillips: Q. Would you state the content of such prescriptions?

A. Well the content contains descriptions for the optician as to the strength of the sphere of the cylinder, and its axis, and any prisms that may or may not be indicated.

Sometimes it includes descriptions to the optician as to [fol. 537] the interpupillary distance, but usually that is left to the discretion of the optician, it being routine that for the completion of a pair of spectacles, that the patient returns to the office and that the glasses are inspected and checked.

Mr. Daugherty: At the office of the ophthalmologist?

The Witness: That is right.

Mr. Phillips: Q. Is it the custom of ophthalmologists to issue such prescriptions to their patients for filling by opticians?

A. Yes, sir.

Q. Are you generally familiar with the services performed by opticians?

A. I am.

Q. Would you describe those services?

A. The optician receives the prescription from the patient, makes up the lenses according to that prescription, he checks over with the patient the type of frame or the style of frame that they prefer, he then makes the necessary measurements as to the interpupillary distance, that is the distance between the pupils of each eye, he then makes up these lenses, adjusts the frame to be certain that they are comfortable and that they fit properly, and that also

[fol. 538] part of his service is afterwards that the patient is apt to return to him whenever the glasses need readjusting.

Q. You have testified that in general practice the ophthalmologist will ask his patient to return to have the eye glasses checked?

A. That is correct.

Q. After the performance of the optician's functions?

A. Yes, sir.

Q. Would you state the purpose of that recheck?

A. To be certain first of all that the glasses are properly made, that the lenses are properly ground, that they fit properly, and that the position of the lenses, particularly in bifocals, is in the proper position.

After all we are dealing with human beings, and there are times when an ophthalmologist may make an error in writing his prescription, and this also gives him an opportunity of checking it to be certain that they are correct.

Q. Is it also true, sir, that a competent optician may have made an error in filling the prescription?

A. That is correct.

Q. And that the purpose of your recheck is to prevent [fol. 539] the factor of human error in such instances?

A. On both sides, yes.

Q. Yes, sir. In your judgment, sir, is it necessary that an optician have the training and educational background of an ophthalmologist in order competently to perform the services which you have described as traditional in his field?

A. No, it is not.

Q. Would it be your judgment, sir, that it is necessary for an optician to have the training and educational background of an optometrist——

A. No, it is not.

Q. —in order to competently perform the services?

A. We have the peculiar situation in California that many of the optometrists now have offices and refuse to fill ophthalmologist's prescriptions at any time, even though they may be old patients, so that they feel that they are more than just people who fit frames and lenses and adjust them, and look upon themselves more in the nature of a profession.

Q. Yes, sir.

A. Rather than the type of work that is done by the optician.

Q. Is the field of opticianry which you have described a [fol 540] field of recent origin or ancient origin?

A. That is a little difficult to answer, because in the past an inferior optometrist was an optician and an optometrist.

With the recent advances in the last perhaps fifteen years of the development of good schools of optometry by our various universities, one of which is the University of California, and I happen to be on the advisory curriculum faculty of that school, with the development of these schools the plane of the optometrist has been elevated a great deal, so that one can look upon him more as a professional man, and therefore with that distinction there has developed a difference between the two groups, so that for example in the State of California the opticians are now licensed under the Board of Medical Examiners, whereas the optometrists have their own licensing boards.

Q. If I understand you correctly California has licensed opticians as a distinct group?

A. Yes, they are licensed under the State Board of Medical Examiners.

Q. I see. Will you state whether in your judgment an optician is a professional man or a semi-professional man [fol. 541] or a skilled craftsman? Which or any of those in your judgment is the proper classification for the services of the opticians as you describe them?

A. In my opinion the right type of optician is more of a skilled artisan than he is a professional man.

Q. Yes, sir.

A. And he is to be more than a mere merchandiser. I mean he has to have adequate training in the basic principles of physiological optics, as far as centering the lenses are concerned, and he has to of course have the skill of properly fitting the frame so that it is comfortable, and realizing how it should be adjusted to avoid interference from the lashes, and position of the eyes and the skull and things of that sort.

Q. In your opinion, sir, is the regulation of the practice of opticianry by statute similar to those in your State of California in the best interests of public health and welfare?

A. Very definitely.

Q. Doctor, you have testified that a school of optometry constitutes a part of the University of California?

[fol. 542] A. That is right.

Q. Does the school of optometry afford instruction in professional ethics and standing in optometry to its students?

A. I can't answer that very positively, except that I am quite certain that they do, because of the fact that I know the head of the school of optometry quite well and have many conferences with him, and know what his ethical standards are, and I am certain that they do.

As a matter of fact I met with him just three nights before coming on to Chicago, in which we discussed some of these things, and I know that the thing that they emphasized in their discussion was that there was no quarrel at all between the optometrist and the optician.

They feel that the time has come when the optometrist is to be considered a professional man rather than an artisan or a skilled artisan, and as they told me, and I was speaking to one of the heads of one of their big national organizations who was there, and he was the one who emphasized the fact that with the new code of ethics of the optometrists as it was developing, they are going into offices, they permit, [fol. 543] in certain localities the optometrists permit no advertising of any sort, no signs on the windows, no neon signs and advertising in the paper, and they are very definitely attempting to elevate it to a profession; and he emphasized particularly because of the fact that he knew that the opticians are under the medical group, that they had no quarrel at all with the optician. In fact he emphasized a number of times that the modern optometrists with their new standards of ethics will not fill a prescription of an ophthalmologist. They feel that they should be filled by an optician.

Q. Doctor, in the development of the professional trend of optometry to which you testified is there a trend on the part of optometrists, is there or is there not a trend on the part of the leaders of optometry to eliminate any dealing with merchandise on the part of optometrists?

A. If you mean by merchandising the question of setting up display windows and displaying frames and making an

attempt to sell new styles and all that sort of thing, my answer would be yes, because in talking to these men, that is one of the things that they emphasized that they disap- [fol. 544] proved of optometrists having display windows with frames and glasses and things of that sort. They felt that they belonged into the field of the optician and not into the field of this profession that they are developing.

Q. Is there any trend to your knowledge on the part of optometrists to change the practice of optometry to a practice of the nature of ophthalmologists in their field so as to eliminate the dispensing of eye glasses?

A. As I understand it they are going to continue to dispense their own glasses, but they send the directions for the proper grinding and the type of frame and the interpupillary distance and so forth to the wholesale houses, wholesale optical houses who make up the glasses, and then deliver them to them, and then they fit them to the patient.

Q. In your judgment, sir, does the method of practice of ophthalmologists and the trends in the practice of optometry make increasingly important—make more or less important the development of skilled competent opticians as a separate skilled artisanry?

A. Well I think that is brought out by the fact that in recent years they have developed schools of opticianry. We [fol. 545] have one in California, in the Los Angeles City College, I believe it is.

Q. I see.

A. In which they now have a—I think they receive a degree. I don't know the details of their curriculum, but they do get training in the art of opticianry, if you wish to call it that.

Q. And is that training and the development of those skilled opticians in your judgment an important aspect of the whole field of visual care?

A. I feel it is a very definite trend toward what is going on in the field of the compensation of vision, that is to give better and better care to eyes.

That is true of all the groups. The ophthalmologists are improving, the optometry schools are improving, lengthening their curriculum, and I feel that this is part of that same trend.

Q. You have testified to the establishment of schools in Los Angeles City College. Have you of your own knowledge observed the establishment of similar educational institutes elsewhere, or do you know of the establishment of similar educational institutes elsewhere?

[fol. 546] A. I know there are several new ones elsewhere, but I cannot tell you where they are. No, I don't know, but I do know that they exist.

Q. Are you familiar with the function of the Board of Opticianry?

A. Only very vaguely.

Q. I see.

Mr. Phillips: That is all. Mr. Daugherty, do you care to question?

Mr. Daugherty: Thank you.

Cross-examination.

By Mr. Daugherty:

Q. Doctor, are you familiar with this lawsuit in which you are giving your testimony?

A. Very vaguely. I have heard a little about it. Mr. Phillips talked to me the other day about it.

Q. Has it been represented to you that this law in Oklahoma puts the dispensing opticians out of business?

A. No, I didn't quite understand that. I am not familiar with the law, but as I understand it, that it put definite limitations on them; but I am not familiar with the law.

[fol. 547] Q. Have you read the law?

A. I have not.

Q. You are not familiar with any of its contents?

A. Very vaguely.

Q. It hasn't been represented to you that it puts dispensing opticians out of business then?

A. No, that hasn't been stressed.

Q. With your permission may I go over some of the provisions of this bill with you and get your opinion——

A. Surely.

Q. —as to whether or not these are good laws with reference to public health, public welfare, and in particular the visual care for the people of Oklahoma?

A. Surely.

Q. Do you think this is a good bill when it provides for th people of Oklahoma that its citizens should receive the be possible visual care?

A. Naturally.

Q. You will agree with that?

Mr. Branton: Excuse me. I would like to interpose an o jection to this whole line of questions on the ground tha the law is being presented to the witness in a piecemea fashion, with no opportunity of the witness to read an [fol. 548] for his own edification interpret the law as a whol You may continue.

Mr. Daugherty: I will be very glad to have the witne read the law if he wishes to take the time.

The Witness: No. I am sorry.

Mr. Daugherty:

Q. Do you agree that it is good for the public health for law to provide that in getting the best possible visual ca that that should only be obtained through the efforts of wo trained ophthalmologists and optometrists?

A. I don't think that is putting it very well, no. I mea that certainly wouldn't work in our state, because th opticians are a very important part of that setup, as far a our state is concerned, as are other agencies, which also hav definite bearing on the care of the vision of the state.

Q. I don't think you quite understand the import of th question. Let me ask you this first then, Doctor, is it you opinion that the ophthalmologist or the optometrist is ful responsible for the visual care of his patient once that rel tionship is created.

A. No, I don't, because you cannot hold an optometri responsible for diseases of the eye, for which he has [fol. 549] been trained, so I don't think you can say yes to question of that sort.

Q. Well let's eliminate diseases of the eye, which I a sure we will all agree are not part of the practice optometry, that is, the treatment of them is not.

A. That is right.

Q. So let's eliminate that, but the question that I am as ing, Doctor, is do you believe that eye examinations ar

eye care should be handled on a professional basis? Do you not?

A. Well what do you mean by eye care?

Q. Well I mean if somebody needs glasses.

A. Yes.

Q. And they come to an ophthalmologist or an optometrist, that they then create a professional relationship?

A. That is right.

Q. Don't you feel that eye examinations should be handled on a professional basis?

A. Eye examinations, yes, sir.

Q. And is there anyone qualified to make eye examinations except an ophthalmologist or an optometrist?

[fol. 550] A. To make the eye examination?

Q. Yes.

A. Not in our state.

Q. Well do you know of anyone else who in your opinion is qualified to make an eye examination?

A. Well according to the law a general practitioner can do that; any physician.

Q. You are talking about any M. D.?

A. Yes, any physician.

Q. Well any physiciaa or any optometrist.

A. That is right.

Q. In other words the question I am asking is very simple, Doctor. This law provides that prescriptions for glasses based on an eye examination should only be written by optometrists or ophthalmologists, or I should say physicians, M. D.'s?

A. Yes.

Mr. Phillips: Counsel——

Mr. Daugherty:

Q. Is there anything wrong with that?

Mr. Phillips: Do you wish to clarify the term "prescription for glasses"?

The Witness: Yes, I was going to ask, you mean merely writing out the descriptions for the optician as to how the lens should be made?

[fol. 551] Mr. Daugherty:

Q. That is right.

A. That is a prescription for glasses, yes, sir.

Q. Other words making examinations followed by a prescription.

A. That is correct.

Mr. Phillips: For lenses.

Mr. Daugherty:

Q. For lenses, yes.

A. Yes. I mean I assume that we are talking about glasses.

Q. For eye glasses, that is right.

A. Yes.

Q. In other words the law says that for the people of Oklahoma only physicians or optometrists shall write prescriptions for eye glasses.

Mr. Branton: Excuse me. For the record I would like to interpose an objection here on the ground that it is an attempt by counsel to interpret the law of Oklahoma.

The Witness: May I ask, because I have been very busy here as president of this organization and I haven't had time to go over this, could you outline for me in a general way just the various things that this law includes?

Mr. Daugherty: That is what——

[fol. 552] The Witness: And then let me go over them one at a time afterwards.

Mr. Daugherty: That is what I was attempting to do, Doctor.

The Witness: Well I would like to get a brief overall picture first.

Mr. Daugherty: That is what I want to do.

The Witness: Yes, please.

Mr. Daugherty:

Q. I will run down these salient points with you, and then take them up one at at time with you.

A. Yes, that is fine.

Mr. Branton: My objection goes to this whole line.

Mr. Daugherty: As far as I am concerned your objections can be made at the time the thing is introduced in evidence, except for leading questions.

Mr. Branton: Very well.

Mr. Daugherty:

Q. This law provides that it is the public policy of Oklahoma that the citizens of Oklahoma should receive the best possible visual care through the efforts of well trained and qualified ophthalmologists and optometrists, and that no unqualified person should be permitted to visually correct for compensation the eyes of another.

[fol. 553] A. May I ask just what that means?

Q. Well——

A. I mean that might be interpreted that the optician who makes it, makes lenses, is compensating for a visual defect.

Q. That will be covered a little later on.

A. I see.

Q. I am satisfied of that, to your satisfaction.

The further provision that it is unlawful for anyone but an ophthalmologist or a physician or an optometrist to examine and fit and adjust glasses and so forth, except that an optical supplier may do that, may interpret the prescription and may fit, adapt and adjust the glasses, provided he has a written prescription from either a physician or an optometrist.

The law further provides that the physician or the optometrist that writes the prescription shall remain fully responsible for the effect of any appliances that may be furnished the patient pursuant to that prescripition.

The law further prohibits advertising the sale of glasses to the public by means of newspaper advertising, window displays, radio, television, and prohibits any means of bait [fol. 554] advertising whereby the public is enticed and persuaded to come into some place for the purpose of securing eye glasses.

Mr. Phillips: May we interpose an objection for the record here that counsel is not in our opinion accurately summarizing that law.

Mr. Daugherty: I think when I have finished I will ask

the doctor to read the law so that he will have it in its entirety, but I will continue, if I may.

Mr. Phillips: Yes, sir.

Mr. Daugherty:

Q. The law further provides that it is unlawful for a physician or an optometrist to receive rebates or kickbacks from opticians.

It further provides that it is unlawful for an ophthalmologist or optometrist to permit an optician or anyone else to solicit business for him.

The law further provides that it is unlawful for an ophthalmologist or an optometrist to make an eye examination as an employee of a lay person or a lay body or a lay group.

And the inverse of that, it provides it is unlawful for any lay person to obtain an eye examination through the employment of a physician or an optometrist on a salary or [fol. 555] on a commission basis.

We sometimes call that a prohibition against corporate practice.

As a further provision, that provides that a retail merchandising store shall not rent space in its establishment to anyone making an eye examination.

Now I would like to let you read the bill, Doctor, if you will, and I think with that statement as to the highlights of the bill as I see them, then perhaps I can go over it feature by feature with you.

A. Aren't you assuming a good deal when you think I can interpret the law?

Q. I appreciate the difficulty that——

A. I mean after all I am just a physician and not trained in legal phraseology.

Q. You are not having any more trouble getting the legal phraseology than we have had in getting the medical phraseology that goes with this problem. (Hands document to the witness.)

A. Mr. Daugherty, as I understand it you are connected with the State District Attorney's office?

Q. Mr. Harkin is the Assistant Attorney General of the State of Oklahoma.

[fol. 556] A. I see. Could you tell me what the provisions of Chapter 11 or Chapter 13, Title 15——

Q. Chapter 11 is the Medical Act governing the practice of medicine in Oklahoma, and 13 is the Optometry Act governing the practice of optometry in Oklahoma.

This bill, and I should have stated this to you, Doctor, is not an Optometry Act and it isn't a Medical Act. It is entitled the Sale of Optical Goods Bill.

A. Yes.

Q. It has a provision in there that it is cumulative though to any of the six Acts in Oklahoma pertaining to the healing arts, which includes medicine, osteopathy, optometry, chiropody, dentistry and chiropracty.

A. Yes.

Q. Those are the six healing arts in Oklahoma, and that bill is cumulative.

A. Well of course right off, here, in Section 2—and I am asking for information only.

Q. Yes?

A. In Section 2, that would indicate, let's say, it shall be unlawful for any person, firm, corporation or company [fol. 557] or partnership not licensed under the provisions to fit——

Q. 11 and 13. That means anybody not a physician or an optometrist.

A. Yes. To fit, adjust, adapt or in any similar manner apply lenses. That means that it is unlawful for an optician——

Q. No.

A. ——in Oklahoma to fit them?

Q. If you continue reading, then you see down here it says "except," about half way down.

A. I see.

Q. In other words unlawful for any person not so licensed to do that, except persons licensed under 11 or 13, may in a written prescription authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense or adjust such lenses, and says may continue to do that.

A. Well that is the thing I wanted to be quite clear in my mind about, you see.

Q. That is exactly as I told you, that it does not, that this bill in our opinion does not put the dispensing opticianer out of business.

[fol. 558] A. In Section 4 do I understand that that would prevent a group of physicians who had an opthalmologist in their group from employing an optometrist to dispense their glasses?

Q. I wouldn't construe it that way at all, no, sir. In other words that is a strict employee-employer relationship between——

A. Of the medical group?

Q. ——between the professional men and a commercial or lay group.

You see that is stated one way, and then turns around and states it the other.

In other words it says unlawful for any optometrist or physician to make an eye examination as an employee of a person, firm, corporation, lay body, organization, group or lay person, and likewise unlawful for any lay body and so forth to make an eye examination through the means of engaging the services on a salary.

To answer your question I will give you my opinion that it does not, would not prevent an arrangement such as you have described.

Mr. Branton: I would like to interpose a comment here that the purpose of this lawsuit is to attempt to interpret [fol. 559] that law, sir.

Now you have heard an interpretation placed on it by counsel for the State of Oklahoma. We of course have a contrary interpretation which will be placed on there.

The Witness: I see. Just one thing that occurs to me, and again I want to emphasize I am not interested in either side, would this prevent a patient who had a prescripttion of mine filled, and the optician gave him a copy of that prescription, would it prevent him from furnishing a copy of my prescription some time if he had his glasses broken, to have his lens replaced?

Mr. Daugherty:

Q. The patient?

A. Yes.

Q. No. Not in my opinion, no, sir.

Doctor, may I ask you if you are aware of the fact that this measure has been approved by the ophthalmologists of Oklahoma at the time of its passage?

Mr. Phillips: We object to that. That is not in evidence.

The Witness: No. I am only aware of the fact that one of the ophthalmologists that I have a great deal of re- [fol. 560] spect for didn't like it very much.

Mr. Daugherty:

Q. I am just asking you if you are aware of the fact——

A. No, I am not.

Q. ——that the Oklahoma Medical Association, representing the ophthalmologists of Oklahoma, found this bill to be satisfactory to them.

A. No, I am not.

Q. Are you also aware of the fact that the attorney for the Executive Council of Oklahoma Medical Association collaborated in writing this bill?

A. No.

Mr. Branton: Excuse me, before we get to that one may we have the bill marked as an exhibit to this deposition?

Mr. Daugherty: I think let's agree that it is the bill that is involved. I don't think there is any need of spending——

Mr. Phillips: It is an accurate copy?

Mr. Daugherty: That is right.

The Witness: This is an accurate copy?

Mr. Phillips: I don't know anything about it. I don't know anything about, it sir. This is something we haven't seen.

[fol. 561] Mr. Daugherty: This is for the doctor's——

Mr. Branton: Just a moment. We are asking—I would like to have it marked, if you please.

Mr. Daugherty: Q. Now, Doctor, you are testifying here under subpoena by the plaintiff in this lawsuit?

A. That is right.

Q. Are you familiar with——

Mr. Branton: Excuse me just a second.

Mr. Daugherty: Q. ——with the owners of Lee Optic Company? Do you know them?

A. No, sir.

Q. Do you know anything about them?

A. Only hearsay.

Q. Do you know Shanbaum? Carp?

A. No, sir.

Q. You don't know any of those individuals?

A. No, I don't.

Mr. Branton: I would like to object to this line of questioning on the ground that no individual is involved in this lawsuit.

Mr. Daugherty: You can object at the time they are introduced in evidence.

Mr. Branton: All right.

Mr. Daugherty: And I am going to object to your making [fol. 562] any more objections when I am examining the witness. Do it at the time of trial.

Mr. Branton: I would like it marked if you will, please for identification.

(Whereupon said document was marked Plaintiffs' Exhibit number 1 for identification as of 10-15-53.)

Mr. Daugherty: Q. Doctor, as an ophthalmologist you are more or less an expert in the field of visual care, are you not?

A. Well I at least have had some training in it.

Q. I believe everyone in this lawsuit will agree that you are an expert in that field, and I think all of us would be interested in hearing what you have to say as to whether or not certain provisions which the legislature of Oklahoma has seen advisable to embody in the laws of that state are good for the visual care of the citizens of Oklahoma, or any state for that matter, good for public health and good for good eyesight, so I would like to ask you if this is a good law when it provides that unqualified people should not be permitted to visually correct the eyes of another and further provides that in Oklahoma examinations for [fol. 563] eye glasses should be made only by licensed qualified ophthalmologists and optometrists [illegible] wrong with those laws?

A. No, sir, that provision I would say was——

Mr. Branton: By examination for eye glasses do you mean examination for lenses?

Mr. Daugherty: I mean examination for eye glasses.

The Witness: Yes, sir.

Mr. Daugherty: That is what the law says.

The Witness: That is what we are discussing.

Mr. Daugherty: That is right.

The Witness: Yes, sir.

Mr. Daugherty: Q. That in the public interest it is good for public health, isn't it?

A. That part I would agree to, yes, sir.

Q. Do you believe that eye examinations conducted by ophthalmologists or optometrists should be done professionally?

A. Well again, from the legal viewpoint, exactly what do you mean by professionally?

Q. Well if a client comes to an attorney there is established a confidential professional relationship. You understand that, do you not?

A. Yes.

[fol. 564] Q. If a patient comes to a doctor there is established a professional confidential relationship?

A. That is correct.

Q. When someone comes to either a physician or an optometrist with defective vision and needs his eyes corrected by glasses, isn't that being done on a professional basis just as if he would come to a doctor with a broken leg?

A. Well speaking for ophthalmology I would say yes. I don't know that I am qualified in optometry, because that entire picture, as you know, is changing.

Q. Yes?

A. There still are men who set—or there are a newer group who set themselves up as professional men, and there still are many of the others who do not, so I don't feel qualified to answer that part of it.

Q. You consider eyesight as a very precious thing, do you not?

A. Quite obviously.

Q. And you consider defective eyesight as a bodily ill?

A. Not necessarily. Can be the result of a congenital [fol. 565] malformation.

Q. Well——

A. A bodily defect I would say.

Q. Well, a bodily defect.

A. Yes, sir.

Q. Again then do you feel that if someone has defective vision that needs to be corrected, that that should be done professionally as being opposed to being done commercially?

A. Well of course that brings up again the situation in optometry that there are, and you know that just as well as I do, that there are still many people, many optometrists who are licensed to examine eyes, who are doing it on a commercial basis, and that it has only been recently that they have been attempting to get away from that.

Q. Well I am just asking your opinion as to how you feel it should be done.

A. I feel it should be done professionally by properly qualified and properly trained individuals.

Q. That is exactly——

A. That is, for the examination itself.

Q. That is right, it should be done professionally?

A. That is right.

[fol. 566] Q. And is there anything wrong with the law that attempts to bring that about in Oklahoma?

A. No.

Q. Do you think that such a law is good for the public health and good for the citizens of the state?

A. If it contains a provision, that particular provision would be good for the public health, yes, sir.

Q. Do you feel that there is anything wrong with the provision of this law that provides that if a patient comes to a physician or an optometrist with defective vision, and the professional relationship is created, that that professional man should not be fully responsible for the care of that patient that he undertakes?

The Witness: Would you mind reading that again?

(Question read by the reporter.)

The Witness: A. No I don't agree to that.

Mr. Daugherty: Q. In other words——

A. A patient may come to an optometrist with defective vision as a result of glaucoma.

Q. I see your point.

A. And the optometrist certainly isn't qualified to take care of that.

[fol. 567] Q. I see your point.

A. Yes.

Q. And I think you raised that a moment ago.

A. That is right.

Q. But let's understand that optometrists do not treat diseases of the eye.

A. I wish that were true.

Q. But merely make eye examinations.

A. I wish that were true.

Q. Well, let's assume that that is true.

A. Now if that is assumed——

Q. And with that in mind, what I am trying to get your opinion about, Doctor, is if you don't adhere to the principle of professionalism that requires that once that relationship is established that the professional man is responsible.

A. Well of course your question would intimate that you are going to hold the optometrist responsible for things which he knows nothing about, because your statement is very broad on that.

Q. We are confining, now we are confining his efforts to eye examinations. In other words, if he undertakes to make an eye examination he would be held responsible?

[fol. 568] A. Well let's change that term to refraction so we know what we are talking about.

Q. Very well.

A. See, after all I work with the academy, I have no interest on either side, but I don't want to be misconstrued.

Q. Yes?

A. I understand that this may go to the Supreme Court, and it happens that two of the justices are personal friends, and I don't want anything misinterpreted.

Q. One of them being a recent appointment I take it?

A. Yes, and the other one for some time.

Q. Doctor, my question isn't intended to be technical,

and it isn't intended to be particularly difficult, but I am merely asking you in your opinion as a professional man if you feel that once the professional relationship is established between doctor-patient, that the doctor is responsible for what he undertakes to do?

A. Well I think that is the interpretation of most of them.

Q. Well is that your opinion that that is good professional practice?

[fol. 569] A. Yes.

Q. Then if that is what this law means, is there anything wrong with that provision of this Act?

A. No, I see nothing wrong with that provision.

Q. As a matter of fact don't you find it very beneficial to the people to know that once they go to a professional man with some bodily ill, that that professional man is responsible for that patient's welfare in that connection?

A. Of course that is assuming that he is doing it to the best of his ability.

Q. Yes, sir.

A. And we all realize that the ability varies tremendously.

Q. Of course.

A. Now some men can do what they feel is the best thing, and it still may not be adequate.

Q. Of course.

A. Yes.

Q. That is understood. Doctor, do you find anything wrong with this bill, considering the public health and the public welfare, when it authorizes optical suppliers to interpret prescriptions and then fit and adapt glasses, provided they have prescriptions from either a physician or [fol. 570] an optometrist?

A. Well would you define optical suppliers, please?

Q. That could be defined as a dispensing optician, or any similar person.

A. In other words, a retail dispensing optician?

Q. Yes.

A. Would be considered qualified to fill a prescription?

Q. Well it doesn't say he is qualified, but this law authorizes.

A. Would be permitted to?

Q. This law authorizes an optometrist or ophthalmologist

to give a written prescription.

A. Yes.

Q. To an optical supplier. That is the verbiage of the bill, Doctor.

A. Yes, sir. That is why I wanted to clarify it.

Q. To an optical supplier. I think we will all admit that would include dispensing optician. To get the prescription and then let him interpret that prescription and then fit and adapt the glasses to the face of the patient.

A. That is right.

Q. Is there anything wrong with that provision of the [fol. 571] Act?

A. No.

Q. Doctor, you of course belong to the American Medical Association, do you not?

A. That is right.

Q. You are familiar with the principles of medical ethics?

A. Yes, sir.

Q. Do you feel that ophthalmologists should advertise?

A. No, I don't.

Q. Do you believe that optometrists should advertise?

A. I don't feel that I am in a position to judge their ethics. I mean that is something that——

Q. Do you feel that ophthalomologists should advertise?

A. No. I certainly feel that they should not.

Q. Do you think that in the field of visual care that regulations which protect innocent members of the public by prohibiting bait advertising and other forms of advertising for sale of glasses is good for the public health?

A. Yes, I do.

Q. And public welfare?

A. I do.

Q. Doctor, you feel that eye examinations and the sale [fol. 572] of glasses should be handled by qualified people on a professional basis?

A. That is right.

Q. Doctor, you feel that if a person has defective vision, that he should start in in the office of a qualified eye examiner, either an ophthalmologist or an optometrist?

A. I would qualify that by saying that I feel that such a man should be examined.

Q. Yes?

A. By a qualified ophthalmologist or optometrist, yes, sir.

Q. Do you think that laws that prohibit advertising which would cause innocent members of the public to go somewhere else in search of eye glasses is a good law for the public?

A. I would say that such an Act that would prevent that, would be good.

Q. You feel that is for the protection of the public?

A. Yes, sir.

Q. Do you feel that it is good for the public health and the public welfare for a law to provide that it is unlawful for physicians or optometrists to receive rebates or kickbacks from any optician?

[fol. 573] A. Yes, I do.

Q. Do you think that professional people should have business solicitors?

A. No, I do not.

Q. Do you find anything wrong with the provision of this law which makes it unlawful for any optometrist or physician to allow or permit someone selling optical goods to solicit business for them?

Mr. Brantou: I object to the form of the question.

Mr. Daugherty:

Q. You are familiar with that provision in this law which you just read?

A. Yes.

Mr. Brantou: Excuse me just a second. Will the record show that the doctor, Dr. Cordes, the witness, spent approximately seven minutes in looking over the law, and that this is the first and only time he has ever seen it.

That is correct?

The Witness: That is right.

Mr. Daugherty:

Q. Did you understand my question, Doctor?

The Witness: No. I would like to have you ask that again, please.

Mr. Daugherty:

Q. You have already testified that you do not feel that [fol. 574] professional men should solicit business.

A. That is right.

Q. And I am merely asking you if you think this is a good provision of the law when it provides that these professional men making eye examinations should not permit anyone selling optical goods to solicit business for them.

A. Of course that is a technical question that is a little difficult to answer, because it involves custom in certain localities.

In the State of California the optometrists originally made it very difficult for the opticians. As a result the opticians were taken in under the law of the Board of Medical Examiners, or under that group, and it is customary for the opticians, who make no examinations for eyes, but merely fill prescriptions, that they do have advertising in their windows, little signs "Consult your ophthalmologist regularly," or something of that sort.

Now that is customary in our state, and apparently is approved.

Q. I hope you are not confused between solicitation of business——

[fol. 575] A. Well——

Q. —and a referral to someone, to some professional person.

A. That of course is a difficulty, that I am trying to interpret legal terms that I am not familiar with.

Q. I know it, and I am trying my best to help you to understand.

A. If you mean that do I object to Bill Jones making it a point to solicit business for Dr. X, then the answer is yes.

Q. You feel that he should not solicit business for a professional man?

A. He shouldn't be soliciting business for a special group or a special man, that is right.

Q. And if Mr. Jones happens to be selling optical goods, you still feel he should not solicit business for either an optometrist or ophthalmologist?

A. He should not solicit, that is right.

Q. You feel that that provision of the law is good for the public welfare, public health?

A. Yes. Of course as I understand it, if somebody comes in and asks Mr. Jones, "Do you know a good optometrist?" and he says, "Why yes, I know Joe Smith over here is all [fol. 576] right," I would see no objection to that.

Q. That is what I meant by referral.

A. Yes.

Q. It was stated eye examinations should be conducted on a professional basis, and people making them being professional people should act as professional people in accordance with the professional ethics.

A. Well that applies to medicine. I am not qualified to state——

Q. To ophthalmologists?

A. That is right.

Q. And you do not feel that they should solicit business?

A. That is right.

Q. Under your principles of your ethics?

A. That is correct.

Q. You find no fault with that provision of this law then, I take it?

A. I do not.

Q. Now again in connection with your feeling that care of the eyes should be done professionally, do you feel that it is good for the public welfare and the public health for this law to make it unlawful for any physician or op- [fol. 577] tometrist to make an eye examination as an employee of some lay group or lay body or commercial house, or do you think that they should make their examinations as a professional without commercial influence?

A. I don't think I am qualified to answer that question one way or the other. I mean that involves a lot of——

Q. Do you have an opinion about it, Doctor? May I give you the information that this was the question of whether or not eye examinations should be done under professional responsibility and direction, or whether the responsibility and direction should be controlled by commercial interests.

Mr. Phillips: Excuse me, do you mean your question is directed to that?

Mr. Daugherty: That is an explanation of my question.
Mr. Phillips: Of your question?
Mr. Daugherty: Yes.
Mr. Phillips: Yes.

Mr. Daugherty:

Q. I am aware of the fact, Doctor, you are not the legislature of Oklahoma.
[fol. 578] A. That is right.
Q. But now you are a professional man practicing ophthalmology, and I would like your opinion as to whether or not you think it is good for the public——
A. Well I would like to——
Q. —a law that provides that eye examination should be done professionally, rather than commercially.
A. Well that is purely a question of ethics of an individual group. I don't think it makes any difference as far as the patient is concerned how he does it, as long as he has been properly trained and qualified and makes a careful examination. I don't think that that is within my province to answer that question either way.
Q. Well are you aware of the situations where commercial interests have hired professional people on a salary, put them up in business and required them to make certain charges and make so many examinations, and that regardless of the patient's needs and requirements, and have permitted commercialism to overshadow and control professionalism on the part of these professional people? Are you aware of such situations as that existing throughout [fol. 579] the country?
A. Yes. I understand that the Permanetti Hospital in California is run on that sort of a basis in which these doctors are hired.
Q. This law has an exemption about hospitals, Doctor, and I am not talking about hospitals.
A. Well, this is not a university hospital, of course.
Q. Yes?
A. It is a private hospital, and it brings up the problem of an individual going into the medical business, because Henry Kaiser is not a doctor, he is a layman, and I am not qualified to answer that question. That is beyond me.

Q. You don't have an opinion on it one way or the other, is that it?

A. I don't approve of it, but I don't think that I am qualified to answer it.

Q. You do not approve of it?

A. No, I do not.

Q. Why do you not approve of it?

A. Because my personal experience is—and I speak only of my personal experience—that the patients that I have seen from this particular hospital, as an example, have not [fol. 580] received what in my opinion would be the proper care, and I am expressing purely my opinion.

Q. Do you think then, based on your opinion and your experience, that any law which tends to restrict eye examinations to pure professional relationships is a good law for the public health and public welfare and people of the state?

A. You are asking me a lot of legal questions, aren't you? Oh boy.

Mr. Daugherty: Would you mind reading that question to the doctor?

The Witness: Here is what I mean, after all I don't think that I am qualified to answer that.

Here we have for example—and I know what you are getting at—we have a large department store in San Francisco. It is one of our very reputable firms. They have in that store an optometrist who is an extremely well qualified optometrist, a very ethical man, who does very nice work, and I have seen patients that have had diseases that happened to come to me, weren't sent to me by him, but happened to have come to me, and I have seen the work he has done and I think he is taking very good care of those [fol. 581] patients, and know, I mean I don't know that I am qualified to say whether—I can't say that those people are getting poor care, because in that particular instance they are getting good care.

Mr. Daugherty:

Q. But you just recited another instance where they weren't getting good care.

A. That is right. That is why I don't think I am qualified.

Q. Under commercial control.

A. That is right.

Q. Do you think that a law is a good law which prohibits some of these improper things that you have seen in your own experience, and protects the public in that connection?

A. I think that any law that legitimately protects the public is worth while.

Q. With reference to the care of their eyes?

A. Yes, sir.

Q. In that same connection, Doctor, do you think that it is good for the public and protection of the public in the care of their eyes where a law provides that no retail merchandising establishment shall rent space or sublet departments to physicians or optometrists or people giving eye examinations?

[fol. 582] A. I don't think I can honestly answer that, because after all this example I gave, I can't see how there can be any objection to this man setting up what after all amounts to a professional office, because it happens to have a certain space within this store.

I mean that is a question for the optometrist to answer, what they consider ethical on that, but as far as the eye care is concerned, that individual that goes to this particular man is getting good care in my opinion.

Another patient who is going to this other group, which would be the type of thing that you would approve, is not getting good care.

Q. Now, Doctor, you are thinking about one isolated instance in San Francisco.

A. That is right, and there must be comparable instances elsewhere, you see.

Q. Yes. Now you have already testified that you think eye examinations should be conducted on a professional plane.

A. Well you are attempting to define what optometry considers a professional plane, because I know that that is understood; and I don't know.

[fol. 583] Q. Well——

A. But speaking for ophthalmology alone, that is all I am qualified to answer. I would say that as far as ophthalmology is concerned it is on a professional basis.

Q. And should be conducted on a professional plane?

A. Yes. I make no pretense of being an expert on optometry, and I don't feel that I can answer for them.

Q. All right. Speaking of ophthalmologists then you feel that they should conduct eye examinations on a professional plane?

A. That is right.

Q. Do you think that they should set up their office in a retail department store?

A. I do not.

Q. And do you find anything wrong with this law which makes it unlawful for them to do that?

A. Not that particular phase regarding ophthalmology.

Q. All right.

A. I see no objection to that.

Q. As a matter of fact that is good for the public health and interest and keeps the eye examination on a professional basis, does it not?

A. Speaking of ophthalmology, yes, sir.

[fol. 584] Q. And would eliminate subterfuges and other means of commercial interests taking over control of professional eye examinations?

A. Well let's say again taking over the examinations by the ophthalmologists, and I will say yes.

Q. Yes, sir. Now that is fair for the ophthalmologists?

A. Yes.

Q. And we agree with you a hundred per cent. Now is there any reason why the optometrists should not be likewise restricted?

A. I don't feel qualified to answer that because as I have stated before their whole code of ethics is undergoing a change. I don't know what they consider good ethics in Oklahoma, and therefore I can't answer that.

Q. Do you have an opinion as to whether or not optometrists making eye examinations should not be likewise restricted?

A. My opinion is this, that probably during the course of the next ten or fifteen years that will be true. At the present time it certainly is not true, as I understand it, as far as ethics are concerned. I think that in the future [fol. 585] it probably will be.

Q. Are you talking about the State of California now?

A. No. I am talking about the United States.

Q. Well now you understand, do you not, that these optometrists are regulated in the various states in accordance with state laws?

A. That is right.

Q. And this is a state law that we are discussing with you here today, Doctor.

A. Yes, I know, but I am not qualified.

Q. If it is held constitutional it will govern not only the opthalmologist about which you testified, but likewise the optometrist.

A. Yes.

Q. My question to you, as an expert in the field of visual care, if that isn't a good provision for the protection of the public, to see that eye examinations by any person are conducted on a professional basis without commercial domination.

A. Well I certainly will answer that as I did before, that as far as opthalmology is concerned, which is the one thing I know something about, I would say yes.

Q. Do you see any reason why an optometrist should [fol. 586] not be likewise restricted?

A. I am not qualified to answer that. I really cannot.

Mr. Phillips: Excuse me just a moment.

Mr. Daugherty: Off the record.

(Discussion outside the record.)

Mr. Daugherty:

Q. I believe that covers the bill, Doctor, provision by provision.

A. All right.

Q. As I see it.

A. All right

Mr. Daugherty: Let me thank you for your patient response to my questions, and I know that we had a little trouble understanding each other, you being a medical man——

The Witness: That is right.

Mr. Daugherty: —and I being a lawyer, but I believe that we have a better understanding.

Mr. Phillips: Doctor, let me ask you just one or two questions.

Redirect examination.

By Mr. Phillips:

Q. First, will you state for the record what you consider [fol. 587] to be the practices of ophthalmologists and opticians and their relationships one with the other which are in accordance with the type of ethics, professional ethics which you are approving here.

Have I made my question clear? I would like you to reiterate for the record how in your judgment the professional practice of ophthalmology and the proper practice of opticianry, as they relate to the various functions of each, are properly carried out.

A. The ophthalmologist makes his examination, and I am speaking again of refraction, determines what the prescription for the patient's eye glasses should be, he writes out that prescription, hands it to the patient, usually asks the patient where he is going to take it, because it is important that we know they go to reliable places, and if they go to any one of a number of people that we feel are reliable, we say quite all right.

If they ask if we have any recommendations, we will mention two or three firms that we feel are reputable, tell them they can take it to any one of these firms.

[fol. 588] The patient takes that prescription to this optician, tells him or picks out from a display cabinet the type of frame that he likes, the optician then has to pick out the frame of that particular variety that fits his face, and he then makes the measurements for the pupillary distance, the distance of the lens from the eye, has the lens ground, or grinds it himself, depending on the size of the establishment, puts it in the frame, the patient comes back and has the frame adjusted, and then is supposed to return to the ophthalmologist, who checks the lenses on a lensometer to be certain that they are correctly made, and then sees that the frame fits properly.

Q. I think that materially clarifies the situation, Doctor. Let me ask you one question further on this subject. In your judgment would it be proper for an ophthalmologist to specify to his patient that that prescription be filled in a specific opticianry, assuming that there were a group of qualified opticianry establishments available?

A. I don't think it is a proper thing to do. I feel that the patient should be assured that the optician that he is [fol. 589] going to take it to, in the mind or in the opinion of the ophthalmologist is a reputable firm.

I don't think he should go any further than that unless he is asked, and then I see no objection to him recommending two or three firms.

Q. On a referral basis?

A. On a referral basis, which in his opinion are reputable firms.

Q. One more question, Doctor. You stated that in the State of California there are certain optician establishments which had modest window displays and modest forms of advertising. Do you find that kind of advertising by opticians objectionable and not to the best interest of the public?

A. No, I see no objection to [illegible] type of advertising. I do object to some of this advertising we see with neon signs and full page ads.

Q. All right.

A. And things of that sort.

Q. You have stated that you object to misleading advertising, or I think bait advertising.

A. That is right.

Q. That kind of advertising.

[fol. 590] A. That is right.

Q. Let me ask you one further question on this subject. Do you believe that it is contrary to the best interest of the public and their health and welfare for competent opticians to insert accurate advertisements in telephone directories announcing that they are opticians and are available for the filling of written prescriptions?

A. I feel that is within the province of the code of ethics of optometry.

Q. Yes, sir.

Mr. Phillips: That is all of the questions.

Mr. Daugherty: Doctor, let me ask you a question in that connection.

The Witness: Surely.

Recross-examination.

By Mr. Daugherty:

Q. If you should find that a window display was the means of enticing the public into an establishment where they were given improper eye care, would you be in favor of seeing to it that those people weren't permitted to make such window displays, in the interest of public health?

[fol. 591] A. You mean by improper, unskilled examinations?

Q. Yes.

A. Of the eye?

Q. Yes.

A. Yes, sir.

Q. As an example, if large window displays are made which entice the public into an optician's place of business, and once in there he sends the man to an osteopath for the eye examination, a person unqualified in Oklahoma—I don't know the status in California——

A. No, we have some darn good osteopathic eye, ear, nose and throat men in the state.

Q. That is an example of unqualified examination.

Mr. Phillips: Mr. Daugherty, let the record show that the laws of Oklahoma hold an osteopath to be qualified.

Mr. Daugherty: You are just 180 per cent wrong, Mr. Phillips.

Mr. Phillips: All right.

The Witness: In the State of California they are qualified.

Mr. Daugherty: Not Oklahoma.

The Witness: And they have their own examining board.

[fol. 592] Mr. Daugherty: This is off the record.

(Discussion outside the record.)

Mr. Daugherty:

Q. I believe you got the question, my question, if it is that means of advertising which in your judgment would bring about improper eye care, you would be in favor of restricting it?

A. That is right.

Q. And that applies not only to window displays but newspaper ads and television ads, telephone directory ads?

A. Any kind of ad that is misleading.

Q. That is right, and any kind that brings about improper eye care to the detriment of the public?

Mr. Phillips: I believe the witness has answered the question.

Mr. Daugherty: I think he answered. You may strike that.

The Witness: All right.

Mr. Phillips: You have a right, Doctor, to read this deposition and sign it, or you may waive the reading of it, and the court reporter will submit it as it is.

Do you wish to read the deposition?

The Witness: No. I think, or at least I tried to be care-
[fol. 593] ful enough that I don't think I need to read it.

Mr. Phillips: Very good, sir.

(Signature waived.)

[fols. 594-595] Certificate of Notary Public to Deposition—(omitted in printing).

[fols. 596-599] Copy

EXHIBIT 1 TO DEPOSITION

The Oklahoma State Medical Association
219 Plaza Court
Oklahoma City 3, Oklahoma

May 11, 1953.

Rep. Paul Harkey,
House of Representatives,
State Capitol Building,
Oklahoma City, Oklahoma.

DEAR REPRESENTATIVE HARKEY:

You have asked for the stand of the Oklahoma State Medical Association concerning House Bill 953, as amended, which recently passed the House of Representatives.

While there was some discussion with regard to Section 2, the bill is satisfactory to us as passed by the House.

Sincerely, Dick Graham, Executive Secretary.

DG:mo.

[fol. 600] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

DEPOSITION—October 15, 1953

[fol. 601] DR. WILLIAM L. BENEDICT, called as a witness by the plaintiffs, having been first duly sworn on oath, was examined and testified as follows:

Direct examination.

By Mr. Phillips:

Q. Will you state your name, sir?
A. William L. Benedict.
Q. What is your profession, sir?
A. I am a physician and surgeon.

Q. Will you state the degrees you hold?

A. I hold a degree of M. D.

Q. Will you state the professional associations or societies of which you are a member, and any offices which you may hold therein, and any committees of such associations or societies of which you are a member?

A. I am executive secretary treasurer of the American Academy of Ophthalmology and Otolaryngology. I am the president of the American Ophthalmological Society. I am a member of the House of Delegates of the American Medical Association representing the section of opthalmology. I am a member of the American Medical Associa-[fol. 602] tion, of course. I am a member of the American College of Surgeons; an honorary member of the International College of Surgeons. I think that is sufficient.

Q. All right, sir. Will you state the history of the practice of your profession, sir?

A. You mean the history of my participation in the practice?

Q. Yes.

A. Following my graduation from the medical school, I was first intern and then assistant and instructor in the Department of Ophthalmology at the University of Michigan for two years. I was three years in private practice in Fresno, California, my practice limited to ophthalmology and otolaryngology.

On April the 1st, 1917 I went to Rochester, Minnesota as head of the Department of Ophthalmology.

Q. Of what institution, sir?

A. The Mayo Clinic.

Q. Mayo Clinic.

A. I was Professor of Ophthalmology of the University of Minnesota on the Mayo Foundation, at the Mayo Clinic [fol. 603] at Rochester, Minnesota from 1917 through 1950.

In 1950 I retired from the Mayo Clinic and from active practice of ophthalmology.

Q. And what have you been doing since 1950, sir?

A. Devoting my time to work as secretary of the American Academy of Ophthalmology and Otolaryngology, and at the present time the additional work as secretary general

for the Seventeenth International Congress of Ophthalmology.

Q. Are you a member of the committee on interprofessional relations?

A. No, I am not.

Q. Are you a consultant to that committee?

A. Not so designated. I am familiar with the activities of the committee, and have sat in on many of their conferences, but I have no appointment as consultant or a member of any of the committees.

Q. Have you been active in the work of the American Medical Association in the fields of interprofessional relationship of ophthalmologists, optometrists and opticians, sir?

A. We have no agency for active participation in work of that kind under the aegis of the section of ophthalmology of the American Medical Association, and only as a delegate [fol. 604] representing the section on ophthalmology have I had anything to do with problems concerning the relationships between the three groups that are interested in visual care, namely ophthalmologists, optometrists and opticians.

Q. As a delegate have you had personal experience in that field and in dealing with the people who were concerned with the problem?

A. Yes. I was directed by the executive committee of the section of ophthalmology to present to the House of Delegates a resolution which in effect reestablished a better working relationship between the members of the American Medical Association and other persons who were interested in the general field of public health.

Q. Have you had occasion in the course of that work to ascertain the opinions of leaders of optometry as to the correct interprofessional relationship?

A. I have discussed the effects of this resolution personally with a few optometrists, but the resolution was published in the journal of the American Medical Association, and in probably some specialty journals, and the results of [fol. 605] my efforts to bring about better working relations between optometrists and ophthalmologists—well, the American Academy of Optometry made me an honorary

member of their society and gave me a special certificate as an award for that specific work.

Q. Are you familiar with the view of the American Academy of Optometry in the field of interprofessional relationship in general?

A. Rather generally I would say. I haven't paid much attention to the part of their magazine that has to do with the interprofessional relations.

I have talked with some of the officers of the academy, and also of the American Optometric Association informally, and I feel that the very fact that they made me a member of the society was an expression of their appreciation of my efforts to take care of their own problems without having to live under restrictions that might be imposed by resolutions or organized bodies such as were carried by the American Medical Association for several years.

Q. Are you familiar with the Board of Opticianry?

A. Yes.

[fol. 606] Q. Did you have any part in the establishment of the Board of Opticianry?

A. Yes, I did.

Q. Will you explain your part in the establishment of that board?

A. Yes. The Board of Opticianry was established to examine and certificate students of opticianry who were taking special courses in the Junior College of Rochester, Minnesota.

That was the first school of its kind that was established, and wishing to put it on a nationwide basis, as other schools of its same type we knew would be formed, we felt it advisable to have a national examining and certifying body, and that was established, and the board I think is incorporated and well recognized as a competent examining and certifying board for students of opticianry.

Q. From your experience in these various activities are you familiar with the general field and methods of practice of ophthalmologists?

A. Well, not from that experience. My acquaintance with ophthalmologists over the country and my interest in educational activities has led me to become as familiar with [fol. 607] practices I think as most anyone could be in a broad general sense.

Q. Do ophthalmologists issue prescriptions for eyeglasses?

A. Most ophthalmologists do refractions, it is part of their work as an examiner and consultant, and if glasses are required to correct a condition of a patient the ophthalmologist writes a prescription for glasses to correct the refractive error. That is all glasses do, of course, is to correct errors of refraction.

Q. Does the prescription of the ophthalmologist contain the necessary data with respect to lenses?

A. Yes.

Q. What other data does it contain, sir?

A. They have specifications for the placing of the lenses before the eyes with regard to their distance that the lens should rest in front of the eye, the angle at which it is held in the frame, the adjustment of the two lenses so that they will properly neutralize the effect on the two eyes in relation one to the other, and to do that they have several ways of implementing their specifications, and in some instances they may go so far as to specify the type, kind and size of a [fol. 608] frame that is to be used.

That is particularly necessary in prescribing glasses for welfare cases where the accounts are paid out of public funds, and the type of frame is particularly important from the standpoint of strength and durability, and that standard frame, as we might call it, is specified by the ophthalmologist, or whoever else writes the prescription; so that the degrees—I mean the amount of specifications that appear on any prescription vary with the needs of the case as the ophthalmologist appraises them.

Q. You have described one situation in which an ophthalmologist would specify the type of frames. What other types of situations might be involved in his specifying a type of frame in his prescription?

A. Well, some patients may need such a specific application of the lenses that the ophthalmologist would request a specific type of appliance.

For instance a person who is to wear the optical correction may have a head of such shape that in order to hold the lenses in the proper place specific instructions must be given. [fol. 609] Also specific instructions are given for the size

and shape of lenses to be worn as a protection in industrial plants, such as goggles, filters, hardness of lenses.

Of all the many things that can be done to lenses to make them more effective, of which there are many, the ophthalmologist will specify sometimes particularly what should be used, and other times he may specify in a general way the requirements and leave it up to a competent optician to make the adjustments to the best of his mechanical ability.

Q. Are the occasions on which the ophthalmologist determines it to be necessary to specify the kind of frame employed frequent or rare?

A. Well, I think it is rather rare.

Q. Does the prescription of the ophthalmologist ordinarily contain data respecting the fitting of the frame to the face, other than the data which you have already testified?

A. No, except for unusual cases, that matter of fitting the frames to the face and fitting the lenses properly before the eyes is left to the optician.

Q. I see. Are you in general familiar with the methods [fol. 609a] of practice of optometrists?

A. You mean as to whether or not they dispense their own lenses?

Q. My next question is—strike that.

A. I don't know what you mean.

Q. Are you familiar with the field and practice of optometrists in order that you can testify whether or not optometrists dispense their own eyeglasses?

A. No, I really don't know what the custom is throughout the nation.

Q. Very good, sir. Now are you familiar with the services generally performed by opticians?

A. Yes.

Q. Will you testify of what those services consist?

A. Well, to a great extent they consist in the finishing of ophthalmic lenses according to the specifications that are written on a prescription, the fitting of those lenses in a suitable frame so that they will be effective as desired, and also he is charged with the service of the glasses dispensed, such as keeping them adjusted, making necessary changes in the adjustment of the frames so that the proper fitting can be used to the best advantage.

[fol. 610] Q. Do opticians customarily duplicate lenses?

A. Oh, yes.

Q. Do opticians customarily mount lenses in frames?

A. That is their business, and they do it.

Q. Do they customarily dispense frames to their customers?

A. Yes.

Q. And you have already testified I believe that they customarily fit the frames to the face of their customer?

A. Yes.

Q. Is that correct, sir?

A. Yes.

Q. Now, sir, will you state whether or not in your opinion an optician must have the training and educational background of an opthalmologist in order competently to perform the services you have described?

A. (No answer.)

Mr. Phillips: Will you read that question to the Doctor.

(Question read by the reporter.)

The Witness: A. Not at all.

[fol. 611] Mr. Phillips: Q. Will you state whether or not in your opinion an optician should have training and skills different from that customarily given or obtained by ophthalmologists in order to competently perform?

A. Certainly. That is why we felt that we must establish a school for opticians, because the number of competent opticians should be increased to give the ophthalmologists better service.

Q. Will you state whether or not in your opinion an optician must have the training and educational background of an optometrist?

A. No, not at all.

Q. Very good, sir. From your work in this general field, Doctor, are you familiar with the antecedents of optometry and opticianry to the extent that you could testify of your knowledge whether opticianry is an old art?

A. No, my knowledge on that is too vague.

Q. I see, Doctor.

A. Too vague to document. I have a general idea of the development of opticianry as a specialty, and I would say

that it is, as we understand opticianry now in our endeavor to improve conditions, that it is rather recent.

[fol. 612] The only established academic curriculum for opticianry and for opticians was established in the Rochester, Minnesota Junior College, and that same curriculum, with minor variations, has been accepted and is now taught in the junior college at Los Angeles and at a school in Buffalo, New York.

Q. In your experience, however, sir, can you state whether opticians have performed the services which you state have been their functions, for many years?

A. Well, yes, but not as we understand opticians today. The persons who fitted glasses into frames hundreds of years ago were usually artists or mechanics that were also concerned in working with jewelry.

Q. Is it the purpose of schools, the Board of Opticianry, in cooperation with ophthalmologists and others interested in visual care, to establish higher and better standards for the education and training of opticians?

A. That is right.

Q. In your opinion, sir, is the development of greater skill [fol. 613] in the services which you have described as being the services of opticians separate and apart from the development of ophthalmology in the interest of public health and welfare?

A. Yes. The things that are necessary to make fine—to make competent opticians, that work that pertains to the fitting of frames and lenses, is not taught to ophthalmologists in any established school. I mean medical school or college.

Q. Is it your opinion then that in order that those services may be properly performed, a continued effort should be made to increase the education and skill of opticians as a separate field of endeavor?

A. Absolutely.

Q. In addition to the schools that you have mentioned, and the establishment of the Board of Opticianry which you mentioned, are there other efforts being made along that line?

A. Well, I believe, I have been told that in the schools of optometry that are recognized as standard throughout the nation, that as a part of their course of optometry the stu-

dents are given instruction in these matters, frame fitting and adjustment that pertains to opticianry.

[fol. 614] How extensive that work may be, and how many hours they put in probably varies from one to another, and it is a part of their work just as a part of learning refraction is a part of the work of an ophthalmologist. They have in ophthalmological colleges a course of instruction. No effort has been made to train the ophthalmologist or the student in the matters that we now consider pertain to opticianry. I understand, however, that the optometrists do include such courses in their school.

Q. In your opinion, sir, are opticianry licensing—or laws of states licensing opticianry as a separate craft or artisanry in the public health and welfare?

A. I really can't say.

Q. Let me simplify that. Laws for licensing, establishing criteria for education and training before permitting the practice of that.

A. I am not familiar enough with the laws to say whether there are laws. Various states do that.

Q. Would it be your opinion——

A. I have heard that there are laws—pardon me.

[fol. 615] I have heard that there are laws licensing opticians, but I am not familiar with them personally.

Q. You are not familiar with the content?

A. I am not familiar with the content of them.

Q. Would it be in your opinion, however, in the interest of public health and welfare that laws establishing educational criteria and training criteria for the practice of the services which are performed by opticianry be established?

A. That is a debatable question. I think it depends upon the necessity of having laws that make people stay within certain limitations that are prescribed by law. That doesn't necessarily mean that they are right and they couldn't better be done some other way.

That is why we have, I think, so many differences of opinion on laws that put restrictions on the activities of certain individuals, and those restrictions are not based upon merits or the ability of individuals to perform the real service, but probably designed to correct an evil that needs to be corrected to protect the people, but in an interpretation

of the law and its application, some unjust restrictions may [fol. 616] be placed upon individuals that in a way affect the general health of the public or the public welfare.

Q. I see. However, Doctor, if a statute of the nature that I propose, or that I am describing to you, does not attempt to impose restrictions upon the legitimate field of the operation of other professions, but is designed to assure the education and training of persons performing these services of opticians, would you think such a statute would be desirable?

A. Yes. We have many examples of that in our own professional work. Our schools are regulated by law. The ability or the privilege of creating a degree must be prescribed by law.

In every licensing act there are restrictions as well as privileges that are named by law, and fortunately laws can be changed from year to year, and the instructions can be changed according to the needs of the people, and therefore inasmuch as they do serve a good purpose, I think that it is good to have carefully drawn and properly enforced licensing laws.

That is a measure of protection of the public against [fol. 617] abuse, and also permits individuals to exercise in the best way that they can for the general public the efforts of their attainments.

Q. Are you familiar with any efforts of opticians in opticianry to obtain licensing laws, of your own knowledge?

A. Not of my own personal knowledge I haven't.

Q. In your opinion, sir, does the health and welfare of the public require the proper development and protection of all three of the branches which are dealing in visual care, of which you have spoken, that is, opticianry——

A. Yes.

Q. ——optometry——

A. Yes.

Q. ——and ophthalmology?

A. Yes.

Mr. Phillips: That is all, sir.

Cross-examination.

By Mr. Daugherty:

Q. Dr. Benedict, are you appearing here today by subpoena?

A. Well, if this is a subpoena (indicating), that is what I——

[fol. 618] Mr. Phillips: Let the record show——

The Witness: I am here because I was asked to appear, and served with this.

Mr. Phillips: Let the record show——

The Witness: Yes, this is a subpoena.

Mr. Phillips: ——that the doctor is here by subpoena.

Mr. Daugherty:

Q. You were. When were you served with that subpoena?

A. I believe it was yesterday, as I remember, around eleven o'clock yesterday morning.

Mr. Branton: That is right, around between ten-thirty and eleven o'clock yesterday.

The Witness: It is a little hazy in my mind.

Mr. Daugherty:

Q. Doctor, are you familiar with this lawsuit in which you are giving your testimony?

A. I can't say that I am very familiar with it.

Q. Do you know any of the plaintiffs, Mr. Shanbaum, Mr. Carp?

A. I say no, I do not, no. I was trying to think who are the plaintiffs. I don't know who are the plaintiffs and who are the defendants.

Q. Well, you understand that Lee Optical Company and Douglas Optical Company are filing this lawsuit to have a law enacted by the legislature of Oklahoma declared to be [fol. 619] unconstitutional and void?

A. In a general way that is what I have learned. That is what I have been told.

Q. You have learned that. Have you ever read that law?

A. I have read only parts of it hastily.

Q. Who gave you the law to read it, Dr. Benedict?

A. I am not sure that I saw the law, but I saw a comment about it, but probably it contained the law, but I am not sure.

Q. Where did you get it?

A. Some papers that Mr. Phillips showed me, but whether that was a statement of the law or comments regarding the law, at the present time I am not sure.

I was very busy, I wasn't interested, and my mind wasn't on it. I didn't give a hoot, really, at that time, so I didn't pay much attention to it.

Q. Was it represented to you that this law in Oklahoma put the dispensing opticians out of business?

A. I got the impression that some of their activities were curtailed.

Q. In what way were they curtailed?

[fol. 620] A. That they were denied the privilege of exercising certain functions that ordinarily are given to opticians without restrictions.

Q. In what way were they——

A. As it had to do with—they were not able to make certain repairs to frames, lens replacements, sale of additional glasses on the same prescription, among others, without a prescription for that specific service, but with a prescription they could perform that service, therefore they were not put out of business, they were merely restricted in performance of their function.

Q. In other words, they were required to do their work pursuant to the prescription of either a physician or an optometrist?

A. Well, not only that, but they could not perform service for a patient, I will say, without a prescription for that specific service.

Q. Well, I think that is what I just said. In other words, they had to have a prescription from a qualified optometrist or ophthalmologist before they would——

A. As far as that goes, when you qualify that, I don't know who else besides optometrists and ophthalmologists [fol. 621] can give prescriptions.

Q. Yes?

A. That is a matter that you should——

Q. Doctor, have you ever read this bill in its entirety?

A. I don't think I ever did.

Q. Would you like to read it and give us an opinion as an expert in the field of visual care regarding its various provisions, as to whether or not they are for the good of the public health and welfare?

A. Yes.

Q. It would take you a few minutes to read the bill. I think it would be best for you to read it, since you have never read it.

Mr. Branton: Let the record show, please, that I object to this entire line of questioning.

Mr. Daugherty:

Q. This is the bill for the sale of optical goods. It starts right here and comes down to here (indicating).

Mr. Branton: I would like to go a little further and say on the ground that it is the requirement to have the witness evaluate and interpret this statute within a period of a few minutes.

[fol. 622] (Whereupon a short recess was taken.)

The Witness: Well, I think I have spent as much time as necessary on this.

Mr. Branton: Will you let the record show that sixteen minutes were spent in examination of the Act by the witness.

Mr. Daugherty: It is certainly appreciated, Doctor, that this law is couched in customary legal and statutory language, and it is not easy to digest it as it has been condensed, in a few minutes.

May I ask you again if you have any objection to giving us your professional opinion as an expert in the field of human vision as to whether or not certain provisions of this law, if they mean what we think they mean, are good for the public health and the public welfare? Do you follow me on that?

A. Yes. I feel right now that as far as I could make out there are no provisions in the law that would be considered as detrimental to the public health or the adequate

performance of the functions of the services described, but I would like to say that it imposes an imposition on the public and the wearers of glasses by having to be required to [fol. 623] obtain prescriptions for certain services that customarily and perfectly satisfactorily have been performed by opticians all over the country for many years.

Q. What are those services that you mention, Doctor?

Mr. Phillips: Would you like to see the law again, sir?

The Witness: A. "For any services except that specifically excepted by the law," and as I read the law the only service that is exempted specifically is "provided that this section shall not prevent a qualified person from making repairs to eyeglasses."

They don't say eye frames. Do you include frames with glasses in this specific statement?

Mr. Daugherty:

Q. That is a matter of interpretation, and I would say that eyeglasses would certainly mean frames.

A. Well, I would assume that.

Q. That would be my interpretation. Of course, the court will make the final interpretation.

A. Well, we usually refer to eyeglasses as the whole [fol. 624] apparatus, the glasses and the frames in which they set. And any other service that might commonly be performed by an optician is prohibited, except that of making repairs.

Q. Unless the optician has a prescription?

A. Yes.

Q. Do you think that that is for the protection of the public?

A. Not protection. For convenience.

Q. Do you think that it might cure some evils——

A. No.

Q. ——in some cases——

A. No.

Q. ——where glasses may be improperly supplied——

A. No.

Q. ——to the customer?

A. No. It doesn't cure anything.

Q. Do you think that he should go into the store of an optician and be supplied with eyeglasses by that optician without his having a prescription?

A. Under certain circumstances, yes.

Q. I do not have any glasses.

A. All right.

Q. I go to that store.

[fol. 625] A. If you put up enough restrictions to the exception; but the only one that is, I think that is worth considering, is the furnishing of additional glasses, pairs of glasses as we call them, to an individual at his own request, without having to secure a prescription from an optometrist or an ophthalmologist for that specific service.

Q. You find objection to such a prohibition, do you?

A. Oh, my, yes. On two grounds. First, that it is an inconvenience, and it delays the individual from making his purchase, and then second, it impels him to go to someone against his own wishes or desire in order to get a prescription for what he wants, when he has——

Q. Just like it impels me to take a bar examination before I can practice law?

A. It isn't that at all.

Q. The same principle, is it not?

A. Not at all. A similarity to that——

Q. If the public, if the legislature sees certain evils that need to be corrected, and they correct those evils by legislation, I believe you have already stated that sometimes [fol. 626] some good practices have to go by the board in order to protect, and cure the evils, isn't that right?

A. No. I don't think that you have stated it exactly as I had.

Q. I don't believe I did, but isn't that substantially the same purport?

A. I would like to make this—I mean we are probably just getting in an argument on words that don't mean much, but you said that if that legislation——

The Witness: What did he say?

(Question read by the reporter as follows: "If the public, if the legislature sees certain evils that need to be corrected, and they correct those evils by legislation, I believe you have

already stated that sometimes some good practices have to go by the board in order to protect, and cure the evils, isn't that right?")

The Witness: A. In general that statement is true, with some qualifications regarding the admissibility of the fact that the acts of the legislature sometimes do not correct those evils.

Mr. Daugherty: Q. Now, let's assume, Dr. Benedict, that [fol. 627] I have a broken lens, a fragment of it, and I take it to an optician, and I don't have the prescription on that lens. Should he be permitted to duplicate that lens and set it into a frame for me?

A. Yes.

Q. Can he tell the axis on which that lens is supposed to be fitted to the eye by looking at that fragment?

A. If he has a large enough fragment to tell.

Q. Now, if he does not have a large enough fragment?

A. Then he wouldn't.

Q. He cannot tell that axis?

A. Then he wouldn't attempt to fill it.

Q. All right. If he does attempt it, though, Doctor, I am likely to have fitted to my eye a lens that is on an improper axis, isn't that correct?

A. Maybe.

Q. That is what I am getting at, Doctor, when I say that sometimes legislation has to work hardships in order to cure some evils which might happen. You see the point I am trying to make?

A. Yes. I can't ask you questions, can I? You must [fol. 628] state it.

Q. You think this is a good bill then, I take it, Doctor, with the one exception?

A. I have only discussed the first part of the bill. The other features of the bill I think are immaterial to this, as far as I am concerned.

Q. Well——

A. I will give you my opinion on it if you want.

Q. Do you agree it is a good law for the public to prohibit unqualified people from giving eye examinations or visually correcting the eyes of another?

A. Yes, I do.

Q. In your opinion is anyone qualified to make an eye examination and write a prescription for glasses except an ophthalmologist or a physician or an optometrist?

A. No one else is qualified, in my opinion.

Q. Do you find any fault then with the law that prescribes that those are the only people that can do that type of work?

A. No.

Q. You think that is good for the protection of the public? [fol. 629] A. Yes.

Q. You don't think the legislature should let blacksmiths attempt to make eye examinations, do you?

A. That is right.

Q. Is there anything wrong with this law when it lets a physician or optometrist send a prescription for lenses to an optical supplier?

A. I see no objection to that provision.

Q. You think the public is being amply protected?

A. Not necessarily by that provision.

Q. Well, does that provision work to the public detriment in any way?

A. No.

Q. Do you feel that a person who has defective vision and who comes to a physician or an optometrist to take care of that condition, that there is created a professional relationship of doctor-patient?

A. Yes.

Q. Do you think that defective vision should be cared for professionally?

A. Well, let me——

Q. Strike the question. I think I know your objection. [fol. 630] I might be able to get at it in another way.

Do you adhere to the ethical principle that once a professional relationship, a confidential professional relationship is undertaken between either doctor and client or—that is, doctor-patient or lawyer-client, that the professional man involved is responsible for whatever service he undertakes to give?

A. He certainly is.

Q. Do you feel that if someone needs glasses and he goes to an ophthalmologist for glasses, that that ophthalmologist ought to be responsible to see that he gets proper glasses?

A. Yes, that is right.

Q. Isn't it the customary practice of ophthalmologists to have the patient come back with the glasses so that they can check them?

A. Yes, that is right.

Q. Isn't that the ophthalmologist discharging his responsibility to his client?

A. Yes, that is right.

Q. To see that he has got the type of glasses that he ought to have?

[fol. 631] A. Yes.

Q. Isn't that a further opportunity to check the work of the optician to see that the optician has followed his instruction?

A. Yes, that is right.

Q. And that the patient is properly fitted with glasses?

A. Right.

Q. Then I am sure, Doctor, that you further agree that the professional man involved, whether he be ophthalmologist or optometrist, is fully responsible to his patient to see that he gets good eye care, good eyeglasses?

A. He should give that as a part of his service, yes.

Q. And you see nothing wrong with that provision in this law, do you?

A. No, I don't object to that.

Q. Isn't that merely making it required that good professional care be given to the defective vision of the people of Oklahoma?

A. Yes.

Q. Or any other state?

A. Professional care, as you ask, yes.

[fol. 632] Q. And that is——

A. Whatever that is.

Q. And that you believe the people are entitled to have?

A. Oh, yes, if they ask for it.

Mr. Branton: These questions, I take it, are directed primarily to the prescription, is that it, to the prescription for eyeglasses?

Mr. Daugherty: Well, I am not limiting it to that necessarily.

Mr. Branton: Then I object unless the question is clarified so that we can tell what you mean.

Mr. Daugherty: Your objection may be noted.

Mr. Branton: Yes, sir.

Mr. Daugherty: And made at the time of trial.

Q. Doctor, you are a member of the American Medical Association, aren't you?

A. Yes.

Q. And also are you a practicing ophthalmologist?

A. No. I have retired from practice.

Q. Oh, I see. You have practiced ophthalmology as a practitioner, have you?

A. Yes.

Q. For how many years?

[fol. 633] A. Oh, from 1912 to 1950 inclusive. How many years is that?

Mr. Phillips: It is a lot of years.

Mr. Daugherty: Q. You believe in the principles of medical ethics of the American Medical Association?

A. Yes.

Q. Do you believe that professional men should advertise the sale of eyeglasses?

A. Professional ophthalmologists should not.

Q. How about professional optometrists?

A. It is customary for professional optometrists to advertise their work and glasses in some sections of the country, and others not.

Q. In some sections yes, and some sections no?

A. Some sections no. It is not a universal thing at all.

Q. As far as an ophthalmologist, though, and a professional man, they should not advertise the sale of eyeglasses?

A. According to the principles of ethics.

Q. Don't you believe in those principles?

A. For ophthalmologists?

Q. Yes, sir.

A. As applied to doctors?

[fol. 634] Q. Yes, sir.

A. Oh, yes.

Q. You have already testified that eyesight, I believe, is a very precious thing and should receive professional care?

A. I have not testified that eyesight is a precious thing.

Q. May I ask you then, Doctor, if eyesight is a precious thing?

A. I don't know what you mean by a precious thing. I can't answer that question. You know that.

Q. Well, is eyesight a priceless thing?

A. I can't answer that. I don't know.

Q. Do you think that defective vision should receive professional care from qualified practitioners?

A. A patient who has defective vision may or may not require professional services. For his own personal good it might be advisable for him to have examination and advice, but maybe he doesn't need care. They don't all need that.

Q. Do you think an optician ought to examine a person's eyes to see whether he needs glasses?

A. Opticians do not do that. It is not part of their business.

[fol. 635] Q. Do you think they should be permitted to?

A. No.

Q. Do you think anybody should be permitted to make eye examinations except ophthalmologists and optometrists?

A. Yes. Any general physician can make an examination of an eye.

Q. When I say ophthalmologist I bean physicians who customarily practice ophthalmology.

A. Well——

Q. Do you think the professional services in connection with eye examinations, furnishing of glasses pursuant to that, should be advertised by these professional people, to make eye examinations?

A. My personal opinion is it is poor taste, but I am sure it doesn't do the public any harm.

Q. Do I understand that you don't agree with the ethics then of the medical association when they say that advertising by members of that association is considered unethical?

A. It is considered unethical.

Q. Do you differ with the principles of medical ethics then when they say that this principle protects the public?

[fol. 636] A. I differ with that.

Q. In other words——

A. It depends on what they mean by protecting the public. And may I also qualify my statement by saying the principles of ethics as they are established are changeable and are re-written from time to time, because of misinterpretation or misapplication, and what is included in the principles of ethics as now established is generally acceptable. At the same time I reserve the right to differ with the statements that are now embodied in the principles of ethics.

I might state further that persons who are responsible for the writing of the principles of ethics have recently asked us as ophthalmologists, of the three national ophthalmological societies, to offer revised statements to be included in the principles of ethics.

Well, what I am trying to say, that the interpretation of the principles of ethics as they are published, comes down largely to a matter of personal opinion, and those matters are debatable, yet overall the principles of ethics are acceptable and we live up to them.

[fol. 637] Q. Let me ask you, Doctor, do you believe that ophthalmologists should advertise their examinations and sale of glasses to the public?

A. No, ophthalmologists should not advertise their services, except in a manner that is considered proper, such as having your type of work listed in the telephone directory or city directory, but we don't include that really as——

Q. Talking about a business card?

A. No, not a business card. I am talking about a telephone directory.

Q. Just a listing in the classified section?

A. Classified section.

Q. Just a listing under doctors, for example?

A. Well, in some telephone directories they list them also as oculists and optometrists, but that is considered——

Q. That is not what I had in mind. I mean newspaper advertising.

A. Display advertising, so-called bait advertising? I do not approve of it.

Q. You do not approve of it in the field of visual care?

A. Or any other activities of any medical person.

[fol. 638] Q. Yes?

A. It applies just as much to those who are not ophthalmologists.

Q. You think this regulation of codes of ethics that prohibits this advertising which you disapprove of is for the protection of the public and to help insure that the public seek out on their own the services of qualified practitioners?

A. I don't think it is on that basis, a protection to the public. I think it is a matter of professional courtesy between individual practitioners.

Q. You don't feel that it protects the public in the least against unscrupulous people?

A. Let's don't make it so extreme. don't make it in the least, but it is not necessary or even advisable to have a strict prohibition of that as far as the public is concerned. No person is damaged by that. It is a matter of professional courtesy largely among the practitioners themselves.

Q. What about a person who is led to believe by an ad that someone can do something, say an eye examination, when in fact he can't, and he goes to that person and re-[fol. 639] ceives glasses that are improperly fitted? Hasn't he received some damage or some detriment?

A. I think you would have a very difficult time in demonstrating that any person is definitely damaged by being supplied with glasses that are not perfect correction of his refractive error.

Q. Well, how about a loss of efficiency?

A. It depends upon so many factors that a general statement of that kind wouldn't apply.

Q. Is there a loss of efficiency through improperly fitted glasses?

A. It would be very difficult to evaluate it. It depends on factors that are so imponderable, that no actual damage occurs from a person's getting glasses that are slightly off. I can wear——

Q. Do you agree with the principle——

Mr. Branton: Excuse me. Let him finish.

Mr. Phillips: Let the witness finish the answer.

Mr. Daughtery: I am sorry. I didn't know the Doctor wasn't through.

The Witness: A. I was going to say my personal experience is I can wear glasses that vary considerably from my actual—correction of my actual refractive error, and it doesn't impede my efficiency to any degree that I can [fol. 640] appreciate.

Mr. Daugherty: Q. You are speaking about your own personal case?

A. Yes.

Q. Doctor, do you agree with the proposition that glasses not properly adapted may seriously aggravate the condition of the patient and bring about nervous disorders and general discomfort and loss of efficiency?

A. In very exceptional circumstances that might apply to a more or less degree.

Q. Yes?

A. But whether one can actually say that that is what brings about this nervousness or not is a matter of opinion and should not be attributed exactly to this change in glasses.

Q. Well, at least you will state that ophthalmologists should not advertise their services?

A. That is right. I am sure of that.

Q. And will you extend that to include the optometrists?

A. I will not go that far. I will say that physicians, who are qualified medical men, should not advertise their services in any way. That to my mind does not necessarily [fol. 641] apply to optometrists. They are not physicians.

Q. Do you consider optometrists, or the practice of optometry as a profession?

A. Yes.

Q. Do you feel that professional men should not advertise their services?

A. Professional optometrists may advertise if they want to. In some places they do.

Q. I am asking you for your opinion, Doctor, not what is done.

A. Well then I will have to qualify my opinion. You included ophthalmologists and optometrists both as professional men, and I have excluded the ophthalmologists, and now you ask me to include the optometrists in that same exclusion, and I didn't do it.

Q. I am just asking you if professional men, and let's include lawyers with it——

A. I can't agree to that inclusion, sir. That is to my mind a leading question, and it isn't right and isn't fair, and I object to it.

Q. Very well, I will certainly withdraw the question, then, Doctor.

[fol. 642] You think this is a good law when it makes it unlawful for any optometrists or physicians to receive a rebate or kick-back from an optical company?

A. I think that is a good provision of the law.

Q. You think that is for the protection of public health and welfare?

A. No, not on that basis.

Q. On what basis then do you think that is a good provision?

A. A matter of decency in the pay, or whatever you call it, for the services.

Q. Do you think that eye examinations performed by an ophthalmologist should be done on a professional basis?

Mr. Phillips: Mr. Daugherty, you have asked that question about five times now.

The Witness: A. It can't be done on any other basis, if you include ophthalmologists as professional men.

Mr. Daugherty: Q. Do you favor a provision of the law that provides that ophthalmologists shall not make eye examinations as an employee of a lay body or a lay person?

[fol. 643] A. I don't agree with that provision strictly.

Q. And how do you reconcile that answer with the fact that you think that ophthalmologists should practice their profession professionally?

A. I make this exception, that in industrial medicine an ophthalmologist may be employed, the same as a man in industrial medicine, and part of his duties would necessarily be the examination of eyes.

It is done in industry by ophthalmologists, by optometrists, by nurses, and by trained lay people, and that facility and privilege should not be denied the people of Oklahoma, and I believe that such a provision as this you mentioned would deny them that privilege.

Q. Well now, Doctor, that is a matter of interpretation, and I won't attempt to argue with you about it, but may I give you this type of an example: Do you feel that an ophthalmologist should hire himself out to an optician and make eye examinations for that optician?

A. I think that would be very poor taste.

Q. Do you think that a law that prohibits that is a proper and good law?

[fol. 644] A. It has some merit, but it can also prohibit a perfectly desirable service. It would depend, I should say, on the ability of the ophthalmologist to perform the services and examine the eyes.

Q. Do you see any possibility that the commercial angle of the employer-employee arrangement might encroach upon the professional attitude of the practitioner to patient, to the detriment of the patient? Is that a possibility?

A. That is a possibility, and I think it is well taken. On the whole I should say I wouldn't approve of an employment of an ophthalmologist by an optician in a place of business such as is usually occupied by an optician. I think there should be some leeway for special exceptions.

As far as services to the public are concerned, a well qualified and competent ophthalmologist may function as such in the employ of a firm, corporation, hospital, or even a private optician.

Q. And again I may not——

A. And if he performs his services strictly in accordance with custom, it isn't a damaging service, and it doesn't lead to damage to the public, but it does upset some of our custo-[fol. 645] mary traditions of the type of services to the public that are to be performed by persons who are specially trained, and in ordinary work perform such services.

Mr. Daugherty: That is all.

The Witness: I mean I just don't want to limit it too much.

Mr. Daugherty: That is all. Thank you, Doctor.

Mr. Phillips: Doctor, let me ask you just a few questions.

Redirect examination.

By Mr. Phillips:

Q. I think it would be helpful if you would define an ophthalmologist and an oculist. Can you do so?

A. Yes. An ophthalmologist and an oculist is a doctor who specializes or limits his practice to the treatment of diseases and disorders of the eye. There is no distinction to be made between oculists and ophthalmologists. They mean exactly the same thing.

Q. Is any doctor who is specializing in the care of the eye entitled to use the word ophthalmologist?

A. Any——

[fol. 646] Q. Any medical doctor who is specializing in the care of the eye entitled to use the word ophthalmologist?

A. Yes.

Q. All right.

A. Do you want further qualification?

Q. Are there any further qualifications?

A. Any physician or medical doctor can have himself regarded as, and in a directory listed as an ophthalmologist, whether he has had any special training in that subject beyond his ordinary medical school or not.

Q. Is it customary, however, is it or is it not customary for the medical doctors who use the term ophthalmologist to have passed the examinations of the Board of Ophthalmology?

A. No, that isn't so.

Q. That doesn't follow?

A. No. Any person whose practice is generally admitted by himself to being fifty or more per cent of his total practice may list himself as an ophthalmologist and be so listed in the files of the American Medical Association and in their directory as such. It is purely a voluntary listing on his [fol. 647] own, and there are no specific requirements for it.

Q. Doctor, you mentioned that it was part of the customary field of opticians to duplicate lenses, is that correct, sir?

A. Yes, it is.

Q. You also testified that an optician properly trained and with proper equipment could take a fragment of a lens

which was off and duplicate that lens, is that correct, sir?

A. That is correct.

Q. If the fragment of lens becomes too small, you testified that a well trained optician would return the patient to the ophthalmologist or optometrist?

A. No. The optician—you speak of him as well trained or honest—would not perform the services of trying to supply another lens when he was unable properly to duplicate it, but that does not mean he would send them back to an ophthalmologist.

Q. I see. In your opinion, sir, in the event that the fragment were too small for him to properly detect the power of the lens and its refraction, and in lieu thereof himself substituted a lens of some other power, or whatever his guess of the power, would that in your opinion constitute duplicating?

[fol. 648] A. No, that would not be duplicating.

Q. Would that in your opinion constitute prescription for a new lens?

A. Not at all. It would constitute a disservice on the part of the optician, and something that he shouldn't do.

Q. If an ophthalmologist were asked by one of his patients to cause a lens to be duplicated, would he ordinarily agree to do so?

A. Will you repeat that? I didn't get that.

(Question read by the reporter.)

The Witness:

A. Well, that is a personal reaction that has no general application. It could be answered either way.

Mr. Phillips:

Q. There is no custom among ophthalmologists to your knowledge as to whether the ophthalmologist would undertake to cause the duplication or would refer the patient to an optician, for example?

A. Well, an ophthalmologist would not duplicate the lens himself, because ophthalmologists are not or should not be themselves dispensing opticians.

Q. I see.

A. There may be exceptions to that also.

[fol. 649] Q. If I understand you, do I understand you correctly that ordinarily the ophthalmologist would not undertake the task of duplication himself, but would either refer the patient or refer the lens to the optician for duplication?

A. Oh, yes, the ophthalmologist generally speaking is not equipped to furnish lenses and properly mount them in the frame. The mechanical part of it must be done in the place where they are fully equipped to do the work right, and by persons who have the skill and the knowledge to do it right.

Q. Is the duplication of the lenses in your opinion a mechanical process?

A. As far as the manufacture and production and finishing of the mounting of the lens, it is a mechanical process, but it requires a special knowledge on the part of the optician to take a blank glass of the right size and quality and put it through the grinding processes to make a product that is specified on the prescription.

That is not mechanical, but requires special training and skill, and the opticians have that degree of skill, some good and some not so good. That is a personal equation.

[fol. 650] Q. So would you say that the skills required in performing the various services that in your testimony you have ascribed to opticians are skills which you would characterize as that of a skilled artisan, a skilled craftsman or some other degree of skill?

A. More than that. It isn't purely a mechanical skill. It requires intelligence and understanding of the application of scientific laws and directives to adequately perform that service, and for that reason we have established schools so that opticians may have more and better training in that particular line of work, that is, we can make better opticians of them.

Q. In your opinion it is a separate set of skills of its own?

A. The ophthalmologist does not have that skill, and he must depend upon the optician to complete his services by filling a prescription, only a part of which he can specify, but cannot fulfill the services himself, therefore he must have an optician who is acquainted with the needs, who understands the service in its relationship to the service of the ophthalmologist.

[fol. 651] It is completing a service to a patient which the ophthalmologist himself cannot do, and which the optician himself cannot do, and only the two together can complete that service.

That is why, if one is called a professional, a little bit of that same regard and attitude falls over onto the optician, so that while his skills are a little bit different, if you will consider the amount of intelligence and training that is necessary to perform this work to the best advantage, then he must be considered a professional man.

Now that depends of course on how broad you will let your regard of the word profession mean. Is it a skilled service or a skilled profession? It is not to be defined by law. It is only a matter of understanding and through custom and connotation that eventually establishes what is profession and what is not.

Q. Would, in your opinion, it be accurate to say that he is a skilled professional man in substantially the same sense that a pharmacist is a skilled professional man?

A. The better trained and educated opticians are in a [fol. 652] sense as much professional as a pharmacist.

Mr. Phillips: That is all, sir.

Do you have any further questions?

Recross-examination.

By Mr. Daugherty:

Q. You mean that an optician is a professional man?

A. My statements I think bear out what I meant by a professional man. I just stated it to you.

Q. Is the practice of opticianry a profession?

A. In my opinion the practice of opticianry by men who are highly qualified may be considered as professional men, and opticianry on that basis I think should be considered as a profession.

Q. Opticianry, then, in your opinion is a profession?

A. I qualified my statement, and I will go as far as I qualified it, but I am not going to make it any more definite than that.

Q. Do you think that professional men should be licensed by the state in which they practice?

A. Not necessarily——

Mr. Daugherty: That is all.

The Witness:

A. —all professional m. n.

[fol. 653] Mr. Daugherty: That is all.

Mr. Phillips: Thank you very much, Doctor.

Now, you have the right, sir, to read this deposition and sign it before it is presented to the court, or you may waive the reading.

The Witness: Well, I would like to read it.

Mr. Phillips: Would it be agreeable to you, Fred, that we ask the clerk to send the original copy to the doctor?

Mr. Daugherty: No, I think the doctor had better, in this case I think he ought to consider some of his answers, I believe, and ought to read it.

Mr. Branton: Well, he meant to read it.

Mr. Phillips: On the same theory as before, and then he should send it directly to the court.

Mr. Daugherty: Yes.

Dr. William L. Benedict, Signature of Witness.

[fols. 654-657] Certificate of Notary Public to Deposition—(omitted in printing).

[fol. 658] In the United States District Court

[Title omitted]

Deposition—October 14, 1953

[fol. 659] Dr. Alson Emmons Braley, called as a witness on behalf of the plaintiffs, having been first duly sworn on oath, deposeth and saith as follows:

Direct examination.

By Mr. Phillips:

Q. Will you state your name, please?

A. Alson Emmons Braley.

Q. Will you state your profession or occupation?

A. I am a physician practicing ophthalmology at the State University of Iowa.

Q. Will you state whether you are a member of any professional organizations or a member of any committees of such organizations, or hold any offices in such organizations?

A. Yes, I am the chairman of the Department of Ophthalmology at the University of Iowa. I am a member of most all of the active ophthalmological societies, the American Ophthalmological Society, the Academy of Ophthalmology and Otolaryngology, the American Board of Ophthalmology.

Q. Are you a member of any committees of the Academy of Ophthalmology?

[fol. 660] A. Yes, I am the representative of the Academy of Ophthalmology to the American Board of Ophthalmology. I am on the Inter-professional Committee for Eye Care and National Inter-professional Committee for Eye Care.

Q. Will you describe the activities and general occupations and functions of the National Inter-professional Committee for Eye Care?

A. The National Inter-professional Committee for Eye Care is a committee that has to do with trying to form better relations between ophthalmologists, optometrists and opticians, both the wholesale and the retail opticians, so that the public will get the best possible eye care that it is possible to give.

Q. As chairman of the Department of Ophthalmology of the University of Iowa do you instruct in the department, sir?

A. Oh yes. I have about ten of what we call residents. They are young men who have graduated from medical school, have taken an internship, and are now being instructed in ophthalmology in our department.

Q. Will you state the colleges or universities from which [fol. 661] you are graduated, and the degrees that you hold?

A. I hold only an M.D. degree from the University of Iowa. However I have done research at Iowa and Columbia and at New York University, that is Columbia University in New York, and also the New York University.

Q. Are you familiar with the general field and practices

employed by ophthalmologists in prescribing eye glasses for patients?

A. I am.

Q. State the practice of ophthalmologists to issue prescriptions for glasses for the patients.

A. It is the practice of ophthalmologists to issue prescriptions or write prescriptions for eye glasses, the same as we write a prescription for a drug. The prescription is taken to the drug store and the prescription is filled. Our association with the glasses is that we do write a prescription, which then the patient takes to the optician, and the optician fills that prescription.

Q. What does the prescription which you issue to your patient contain?

A. The prescription only contains a description of the type of lens which is to be manufactured, the amount of [fol. 662] correction that is to be placed in the glass.

Q. The prescription does not contain a description of the frames?

A. No. There is no real description of the frames. Occasionally for certain types of glasses we suggest certain types of frames, the same as we suggest certain types of glasses to fill a particular prescription. We know they will function better than some other type of glass or frame.

Q. What would be those occasions, sir, in which you would suggest?

A. Well for instance after a cataract operation there are certain different kinds of glasses that fill a prescription better, and we recommend those.

Now that doesn't necessarily mean that the patient will order those or want to buy that particular kind of glass.

Q. Would the occasion on which you would recommend the frame be frequent or rare?

A. Oh it is rare, I would say. We usually leave that entirely to the discretion of the patient as to the type of frame that she likes to get or he likes to get.

[fol. 663] Q. What in your opinion, sir, are the primary tests of the selection of an appropriate frame?

A. Of course the size of the width between the nose, the size of the frame as it goes out to the side of the face, and that is a function that we do not ordinarily do. The only

function that we have really is to recommend the kind of glass that they are to get.

Q. You testified, sir, that your practice is to issue prescriptions which are given to opticians for filling?

A. That is right, sir.

Q. Are you familiar with the practices and procedures employed by opticians generally in filling such prescriptions?

A. Yes. Of course we must have contact with opticians who will fill our prescriptions well, and of course we are constantly on the alert for good qualified opticians.

Q. Will you describe the general functions performed by opticians in filling your prescriptions?

A. Well of course that I more or less leave to them. When I find a good qualified optician, as we have at the University of Iowa of course, now these men take a blank glass, center [fol. 664] it, grind on the powers that we have given in our prescription, edge the lens, fit it into a frame that has been usually the patient's choice, with the help of the optician, so that the frame will fit the face, and so forth, and then the glasses are finally made up in that frame and given and fitted to the patient.

Q. The optician who is handling your prescription fits the frame to the face?

A. Correct.

Q. Do you check his fitting then?

A. Yes, we always check the patient, mainly to be sure that the patient's frame fits the face all right, to be sure that the glasses are made properly and that, for instance in the case of a bifocal, that the bifocal segment is at the proper level.

Now if we have a competent optician, as we have at Iowa City, we check, and it is more or less of a supervision check to see that it is all right, to be sure that it is right.

Q. Will you state whether or not the purpose of your check is to determine whether the optician is qualified, or to determine whether there has been a human error committed [fol. 665] in the fulfilling of the prescription?

A. Well ordinarily we try to ask our patients, not always ask them, but we hope that our patients will go to a qualified optician, and because we do not necessarily say "You must

go to this optician to have your glasses made," we like to check to be sure that the glasses are all right, are satisfactory.

In the case of a good optician whom we have been associated with for many years, as we have at Iowa City, we only check to be sure that the patient is satisfied with the glasses.

Q. Very good, sir.

Mr. Harkey: Counsel, it is now fifteen after two; past that. Do you propose to continue so that we will be permitted to have an opportunity to cross examine?

Mr. Phillips: No, sir, we propose to continue, and to afford you the opportunity to cross examine at a later time.

Mr. Harkey: Today?

Mr. Branton: No, sir.

Mr. Harkey: You will not afford me an opportunity to cross examine today?

Mr. Phillips: Not unless the witness can make himself [fol. 666] available at any time later in the day.

Mr. Harkey: I would like at this time to interpose an objection to the introduction of this testimony in this trial unless opportunity is afforded the defendants to cross examine this witness on this day, inasmuch as counsel remained in this room ready to take the testimony of the witnesses from 9:30 A.M. on this date until 1:00 P.M., returned at 2:00 P.M., at which time the examination of this witness commenced.

Mr. Phillips:

Q. Doctor, are you familiar generally with the practices and procedures employed by optometrists?

A. Because of my association with the Inter-professional Committee on Eye Care in Iowa I have become acquainted with many of their practices and their profession.

Q. Do you know whether or not it is the general practice of optometrists to dispense their own eye glasses?

A. That is generally true, in our state at least, that the optometrists usually dispense their own eye glasses. Not all of them though. There are a few optometrists in our state who send their prescriptions to opticians for dispensing.

[fol. 667] Q. Do you know, Doctor, whether the profession or craft known as opticianry is of recent origin or of an ancient origin?

A. It is of ancient origin. The opticians have been making glasses for many, many years, and of course the Zeiss Company in Germany is well known, and of course the Bausch & Lomb Company in the United States, for the manufacture of glasses, is well, is very well known, and glasses have been manufactured—as a matter of fact Benjamin Franklin made the first paste-on bifocals, as you know, from trying to get something that was a little more convenient for him to read; so that glasses have been made for many, many years.

Q. Do you know, sir, whether in the fields of ophthalmology and optometry opticianry is generally recognized as a separate field?

A. Opticianry is generally recognized as a separate field, and particularly in an area where ophthalmologists must by necessity have someone to fill their prescriptions.

Q. In your opinion then is it necessary for an optician to have the skills and educational background which are re-[fol. 668] quired by law to be possessed by an optometrist in order that he may properly perform his function?

A. Not the same skills, I would say. The skills of the optometrist are primarily those of measuring for glasses, similar to what we do, whereas the skills of an optician are primarily those of knowing glass, of knowing some of the mechanics of fixing glass. They are excellent mechanics. They must know physics, and all of the properties of what happens with glass, and when you do work with it, and the other things too, for that matter, so that their skills are usually considered more of a mechanical nature than are the optometrists' or the ophthalomogists'.

Q. In your opinion, sir, is an ophthalmologist trained to perform the services which customarily are performed by opticians?

A. Well the field of ophthalmology is so enormous, that my program at Iowa City is a four-year program, during which time it is next to impossible to teach him to make his own glasses.

It would be physically impossible for an ophthalmologist

to also, besides his other duties with medical pathology and [fol. 669] everything, to make his own glasses.

Q. In your opinion is a well trained optician more competent to perform the functions of an optician in fitting frames to the face, than the ordinary ophthalmologist?

A. Yes, they are, because they are, to begin with, usually interested in mechanical things. They are very clever with plastics, and very clever in their handling of glass; the well trained opticians are; and certainly they can do things with glasses and frames that I cannot begin to do, and I don't have the training nor the interest to do.

Q. Doctor, what are the procedures employed in order to duplicate a lens?

A. The lens is ordinarily measured by a measuring device which is called a lensometer, and with this device they can measure the prescription, ordinary prescription for a lens, and with that measurement they can re-duplicate a lens providing they have enough of the glass left to re-duplicate from.

Q. Is the technique of operating a lensometer a technique which requires the trained skill of an optician and ophthalmologist?

[fol. 670] A. Well the opticians are very clever at it. As a matter of fact they do very well at operating it. As a matter of fact the opticians actually first made the first lensometers that were made.

Q. Thank you, sir. In the course of your experience with the Inter-professional Committee are you familiar with any efforts by opticianry to improve the qualifications of its personnel?

A. Oh my, yes.

Q. Would you state some of those efforts?

A. In Iowa our Inter-professional Committee Local State Committee, has started a society for opticians, and we are in the process now in Iowa, through the opticians, of attempting to have the opticians registered and take an examination in the state so that they will come up to certain qualifications that we think are rather important for their performing their functions or their duties.

Q. Are you familiar with the Board of Opticianry?

A. Yes, I am familiar with the Board of Opticianry.

Q. Can you state the function of that board?

A. The function of the Board of Opticianry is an effort on a national level of all opticians to elevate the training or to improve the training of opticians so that all opticians [fol. 671] will be qualified as qualified opticians, qualified by the Board of Opticianry.

Q. Will that board serve a function similar to the function of the Council on Ophthalmology, the Board of Ophthalmology?

A. Yes. Of course it at the present time fills a function similar to the Board of Ophthalmology. They are not allowed a license by any manner of means, by taking the board. It is a personal thing, in knowing that you have filled the qualifications necessary to take the American Board of Ophthalmology, as far as ophthalmologists are concerned, and so far as opticians are concerned, to pass the tests of the American Board of Opticianry.

Mr. Phillips: It is now 2:30.

The Witness: I could stay a little while.

Mr. Phillips: All right, sir.

Cross-examination.

By Mr. Harkey:

Q. Dr. Bradley, do I understand from you that an optician is a person who makes glasses?

A. That is correct.

[fol. 672] Q. In your work as a practicing physician when you write a prescription do you consider that your physician-patient relationship is ended then, or do you insist that the patient return so that you can check the glasses to see that they properly fit?

A. If we have a qualified optician such as we have at the University of Iowa, it is not always necessary to have the patient return. However it is nice to have them return to be sure that the glasses fit the patient well, and be sure that they are all right.

Q. In other words you don't pass that responsibility on; you feel that you are still responsible for the visual care of your patient?

A. Yes, but they still perform a very important function.

Q. In other words the physician is still responsible?

A. The physician is not responsible for the—really, for the manner in which the glasses are manufactured or made. That is one reason why we check them. If the glasses are not properly made we send them back and they are remade until they are right.

Q. In other words if a pair of glasses are improperly fitted and improperly made, you consider that it would be [fol. 673] your responsibility to inform the patient of the fact and to insist that the glasses be made properly to fit your prescription, is that correct, sir?

A. That is correct.

Q. In the event that you did not put down the size of a lens, and the patient were to talk to the optician and they were to decide to have certain large sun goggle lenses made to that prescription, would the optician go ahead then and convert the prescription to the large type of lens, or would he refer the patient back to you for that conversion?

A. Under ordinary circumstances, where I am, the optician usually calls up on the telephone and says, "Will it be all right if we make up a large type of sun glass for this patient?"

Q. Doctor, in your course there you do give instructions on eye refractions, don't you?

A. Oh yes.

Q. What percentage of the time that a resident spends in his residency is spent on the instructions in refractions of eyes?

A. You mean in my four-year residency?

Q. Yes, in the four-year residency, instruction and [fol. 674] training.

A. Instruction and training. I would say he does it full time for a year, and there is never a patient comes in but what we don't refract the patient, and therefore the refraction is part of almost every examination.

Q. Now, Doctor, what percentage of your patients, outside of athletes, do you normally prescribe contact lenses for?

A. Do I normally prescribe contact lenses for?

Q. Excluding athletes.

A. Excluding athletes. Oh, one per cent or less I would say.

Q. Why do you not prescribe more contact lenses?

A. Well because contact lenses under ordinary circumstances have not in my opinion proved entirely satisfactory for constant wear.

Q. Do you think that a person should, without the advice of an ophthalmologist, wear contact lenses for cosmetic purposes?

A. You understand I am on the Inter-professional Committee for Eye Care, and there are a fair number of optometrists who make contact lenses. I am trying with all my effort to bring about the best possible cooperation between [fol. 675] all three groups involved, and therefore I would prefer not to make a direct statement as to who should fit contact lenses and who should not.

Q. That wasn't the question, Doctor.

A. Well you asked me——

Q. No, that wasn't it. Read the question.

(Question read by the reporter as follows:

Q. "Do you think that a person should, without the advice of an ophthalmologist, wear contact lenses for cosmetic purposes?")

Mr. Harkey: Q. Well we will change that, Doctor. Without the advice of an ophthalmologist or optometrist should a person wear contact lenses for cosmetic purposes?

A. I still give you practically the same answer so far as I am concerned, because I realize that there are many people who would like to try contact lenses, and I know from past years of experience of fitting contact lenses that the majority of the lenses will spend most of their life in the top dresser drawer, particularly if they are for cosmetic purposes.

Q. Doctor, do you in your business as a practicing phy- [fol. 676] sician do any advertising either in the newspapers or over the radio, soliciting patients to come to you?

A. Never.

Q. Do you know of any ophthalmologsts that do such?

A. No, I don't know of any.

Q. Do you know of any good opticians that advertise in such a manner?

A. There are some opticians, some, that I would consider as fairly good opticians, who occasionally put in the newspaper an ad on better vision, and on occasion will actually put in an advertisement for possibly a new frame or a new type of frame.

Q. Doctor, do you think that is good from the standpoint of visual care of our public to have any person advertise glasses in the newspaper or advertise visual care or professional examinations?

A. Well now you are hitting on a very, I think a very touchy point. In the first place, people must be educated by some manner or means.

Q. Well this——

A. I, for instance I put on, not long ago, a television show for the State Medical Society. Now I know that some of my friends say, "Well that is an advertising media."

[fol. 677] Q. Well, Doctor, wasn't the show designed to get people into a certain place of business so that they would buy glasses?

A. No, it was not. It was only for education.

Q. It was only for education?

A. That is right.

Q. That would be what we would call ethical educational publicity by a legally considered health group, wouldn't it?

A. That is right.

Q. And that kind of educational publicity is a proper educational medium that your ethics of the American Medical Association covers?

A. Yes.

Q. Now do you think that any person should have steerers or cappers or solicitors soliciting patients for them to have an examination given to them?

A. Oh no.

Q. Do you think that people should be enticed into a place of business to buy glasses because of window displays of frames and so forth?

A. Well, looking at it from the patient's viewpoint, and particularly my wife's viewpoint, I can say that she is on the constant lookout for a new type frame for herself that

[fol.678] will go with another dress, or this and that. You know, I mean it is one of those things that——

Q. Doctor, I would like to ask you, does your wife have any cylindrical correction in her prescription?

A. Well she has, yes.

Q. If for instance she were to wish to have her—say she had on one of these sharp diagonal lenses like the ladies do wear now, that gives them a slightly oriental look, it is almost impossible after a lens has been broken, from such a glass to determine what the accurate axis of the cylindrical correction was, isn't it?

A. (No answer.)

Q. Now would you want your wife to——

Mr. Phillips: I object to that question.

Mr. Harkey: Q. ——to go into——

Mr. Phillips: The counsel is now testifying. Please ask a question.

Mr. Harkey: Q. Would you like for your wife to go into an optician that you didn't know and have an attempt made to duplicate a broken lens of such type for her?

[fol. 679] A. I can see that you know a great deal about this business, probably a little more than I do actually, and for that reason I believe that a good optician might be able to tell what that lens was.

Of course it isn't always possible from a broken piece of glass, unless you have, as I said before, unless you have a piece big enough, you can't always find out what the glass is, and a good optician would admit immediately that he couldn't tell.

Q. Dr. Braley, after all is said and done the best way for you to take care of your wife's vision, after she has found her frame, is to come back and have you sit her down before a phoropter and check her with the glasses on, isn't it?

A. Well I don't know. I suppose.

Q. Do you believe, Doctor, that an unqualified person should receive compensation for visually correcting the eyes of another one?

A. I am sorry, I don't know what you mean by that?

Q. Well do you believe that a person who is not an op-

tometrist or ophthalmologist should receive pay for prescribing glasses for a patient?

A. For prescribing glasses?

Q. For prescribing glasses for a patient.

[fol. 680] A. Well what are you going to do about the glasses that are sold in the dime store?

Q. Well let's except that right now, and then I will come to that in just a moment.

A. Oh.

Q. For prescribing. It is my understanding glasses in the dime store are not prescribed.

A. I see.

Q. For writing a prescription.

A. For writing a prescription? Well as far as I know the only ones who actually write the prescription—the opticians have nothing to do with prescriptions, let's say. The only thing they do is actually make the lenses. They don't prescribe the glasses.

Q. Now do you think that the optician should steer people to the office of specific oculists or specific optometrists for examination, or do you think that is soliciting like any other type of health soliciting?

A. No. I am sure that in any practice, no matter where you go, there is a certain amount of steering.

For instance my wife goes in to have her funny shaped glasses replaced because one lens is broken, and they are unable to do so. The optician says, "Well I cannot re-[fol. 681] place it. You will have to go and see your ophthalmologist or your optometrist in order to have it replaced." I don't believe that is necessarily steering.

Q. No, but if that optician were to say you should go and see Dr. Brown or Dr. Jones or Dr. Conte and get a prescription, would you think that that would be proper?

A. That is not proper, no.

Ordinarily, however, a new individual in a town, coming to a town, the way we do it in Johnson County Medical Society, is to refer them to the Johnson County Medical Society, and they there have a list of people that they refer to.

Q. Now, Doctor, when a grandma goes into the dime store to buy a pair of simple magnifying type reading glasses,

do you think that she is expecting a professional service, or she is just buying a pair of reading glasses?

A. Well of course she is not expecting a professional service. She is only getting a pair of reading glasses.

I will have to be going.

Q. One further question. Doctor, do you think that a physician should have and maintain an office in a drug store [fol. 682] where the clerks and the druggist refer patients to him? Except a small, we will say a very small town where it is natural.

A. Oh, my father was a druggist. My father was a druggist, and I lived in a small town, and the people used to come in there, and we tried our best to take care of the public health of that community and we referred patients to the doctor who was in the same building with us.

Q. Was he down right in the drug store?

A. No, sir.

Q. Or in the same building?

A. He was upstairs. He was in the same building, it is true, and we referred them to him.

We took care of what we could, particularly at night, because the poor guy was overworked to begin with; and I lived in a small town from the time I was a boy until—well, still live in a small town for that matter.

Q. Do any of the good opticians that you have faith in have shops in jewelry stores?

A. No.

Q. Do you think that would be very proper for an optician to have his glasses and frames in the windows of a [fol. 683] jewelry store and operate as a part of a jewelry store?

A. Well of course that is what we are trying to do, we are trying to improve the profession of opticians. The bulk of them are fine men.

Q. Yes. And do you find that among these eye glass mechanics that some of them—that you just will run into a sour apple once in a while?

A. You run into sour apples no matter where you go, in every profession, no matter what profession you run into. You run into an occasional sour physician too.

Q. Do you think in the case of a sour physician or sour

optician that the law should crack down and force them to take good care of public health?

A. The public health of course is the most important thing.

Mr. Phillips: I hate to interrupt you, but it is now quarter of three.

Mr. Harkey: You want to leave?

The Witness: Yes.

Mr. Phillips: Mr. Daugherty, do you desire to cross examine?

Mr. Daugherty: Yes, I have some questions I would [fol. 684] like to ask the doctor.

Mr. Phillips: Doctor, when would it be possible for you to resume?

The Witness: Well I could come up after I finish the class.

Mr. Phillips: What time would that be, sir?

The Witness: Well let's see, have you got one of the books?

Mr. Phillips: Yes, sir.

The Witness: It will be a little after four.

Mr. Phillips: We will wait for you.

Cross examination.

By Mr. Daugherty:

Q. Now, Dr. Braley, you of course are an ophthalmologist?

A. That is correct.

Q. Are you a practicing ophthalmologist?

A. I do practice.

Q. You also instruct at the University of Iowa?

A. That is correct.

Q. You are a member of the American Medical Association?

A. I am.

Q. Are you familiar with the principles of medical ethics [fol. 685] of the American Medical Association?

A. I am.

Q. Do you believe in those principles?

A. I do.

Q. Do you follow them?

A. I do.

Q. In your opinion is there anyone other than an ophthalmologist or an optometrist that is qualified to make an eye examination and write a prescription for the grinding of lenses for the correction of defective vision?

A. That is correct.

Q. Those are the only qualified people?

A. Yes, sir, to date those are the only qualified people, that is right, so far as I am concerned. There are no others.

Q. In your opinion as an expert in the field of vision, those are the only two qualified people to make an eye examination?

A. That is right.

Q. Do you feel that in the interest of public health and in the interest of good visual care that unqualified people should be prohibited from making eye examinations?

[fol. 686] A. From making eye examinations, that is correct.

Q. Do you then agree that only well trained and qualified optometrists and ophthalmologists should make eye examinations and prescribe for glasses?

A. That is correct.

Q. Do you feel that an optician should dispense glasses only on the written prescription of a well trained and qualified ophthalmologist or optometrist and no one else?

Mr. Branton: Excuse me. May we go back? I wanted to wait until you asked that question. May we go back to the question before? I notice you used the word glasses. By glasses were you referring to lenses or were you referring to the entire glasses?

Mr. Daugherty: Lenses, I think.

Mr. Branton: Lenses. All right.

Mr. Phillips: I believe the doctor answered it.

The Witness: I answered it as lenses.

Mr. Branton: Excuse me.

Mr. Daugherty: Did you get the last question, Doctor? Will you read it?

(Question read by the reporter.)

Mr. Branton: Now again you mean lenses?

[fol. 687] The Witness: Lenses.

Mr. Daugherty: Yes, sir.

Q. Do you feel that when a prescription is made for lenses by either an ophthalmologist or an optometrist, that that person should remain responsible for the full effect of any appliances which may be furnished pursuant to his prescription?

A. He is responsible for the lenses and the manner in which they are placed in front of the eyes.

I don't see how he can be responsible for the type of frame that the patient buys on his own.

Q. Well maybe you did not quite understand my question. Is he responsible for the full effect of any appliances which may be furnished him by anyone else?

A. He is responsible to be sure that it is correctly made.

Q. Do you feel that when a patient comes to you with defective vision that there is established between you and that patient a professional relationship?

A. Very definitely.

Q. Is it also a confidential relationship?

A. Very confidential.

[fol. 688] Q. Do you feel that anyone else should share with you that professional confidential relationship with your patient with reference to his visual care?

A. I believe that I can see some implications in the question that I am unable to say for sure.

For example I do not dispense my own drugs, and by ordering a specific drug for a patient from a drug store, that may in itself divulge certain secrets about the patient, which I cannot be responsible for, and I write a prescription for a drug which the patient takes to the drug store, where the druggist fills that prescription, and he in turn may have some idea about what the drug is administered for.

Now so far as glasses——

Q. Let's stay on eye glasses, Doctor. Your prescription, as far as I am concerned, where you attempt to correct the vision of one's eyes.

A. Yes.

Q. Don't you feel that you are responsible when you

undertake on a professional basis to treat corrective vision, don't you feel you are responsible for it?

A. I am fully responsible for it. I feel the responsibility, [fol. 689] but in turn I cannot manufacture the glass, nor can I—do I have the time to make the glasses for the patient, and therefore I have to turn over a certain amount of that responsibility to someone else and see to it that those glasses are properly made, you see. No more than I could set up a plant like the Bausch & Lomb Company has. I couldn't possibly do that.

Q. But you say that you see to it that the glasses are properly made?

A. Yes.

Q. And in other words you feel professionally responsible to see that your patient gets the proper visual care at your hands?

A. That is right.

Q. Do you think that human eyesight is a very precious thing?

A. Very valuable, or I would not be in ophthalmology.

Q. Do you think it should be taken care of professionally or commercially?

A. It should be taken care of professionally.

Q. Do you think that a person who has defective vision and needs lenses should start out in the office of a professional man for that need?

[fol. 690] A. That is a normal process as far as I am concerned.

Q. You think that is where it should start?

A. That is where it ordinarily starts.

Q. I believe you testified that you believe that the examination of the eyes, and visual care, should be done professionally and not commercially?

A. That is correct. That is what we are striving to get.

Q. Do you advertise your professional services?

A. Do I?

Q. Yes.

A. Never.

Q. Do you think that——

Mr. Harkey: Counsel, can we put, with indignation "Never"?

Mr. Daugherty:

Q. Do you think that advertising should be permitted with reference to the matter of visual care?

A. Not advertising with reference to visual care. So far as I am concerned I don't think that there should be any.

Q. Do you know what bait advertising is?

Mr. Branton: I object to that question unless some indication is given as to the definition of visual care. What [fol. 691] does visual care mean? How do you intend it?

Mr. Daugherty: Are you through with the objection?

Mr. Branton: Yes, sir.

Mr. Daugherty:

Q. Now you may answer my question. Do you know what bait advertising is?

A. No, not for sure. I don't know what your interpretation of bait advertising is.

I know that we have discussed in the Inter-professional Committee on a number of occasions price advertising, in which they advertise a price, a low price for a pair of glasses. That may be interpreted as bait advertising, and of course that is one of the things that our Inter-professional Committee is trying to eliminate, is the price advertising.

Is that what your interpretation of bait advertising means?

Q That is one interpretation of it, yes, Doctor.

As an ophthalmologist then are you opposed to any form of advertising as the same pertains to visual care which would cause a member of the public to come into a non-professional establishment when in need of visual care?

[fol. 692] Mr. Branton: Excuse me. Again I object unless there is some definition of what the word visual care means.

Mr. Phillips: Why don't you state directly what you have in mind with respect to your advertising?

Mr. Harkey: He is using legal terms.

Mr. Phillips: Well that may be, but we are not speaking to a lawyer. As a lawyer I don't know what visual care means either, so——

Mr. Branton: That was for the record, Doctor.

Mr. Phillips: That was for the record, Doctor.

The Witness: Yes, I see.

Mr. Phillips: If you desire to have the question so it will be clear——

Mr. Daugherty: Will you read the question for him, please? See if the doctor understands it.

(Question read by the reporter as follows:

"Q. As an ophthalmologist then are you opposed to any form of advertising as the same pertains to visual care which would cause a member of the public to come into a non-professional establishment when in need of visual care?")

The Witness:

A. Well I am apposed to advertising for the most part. [fol. 693] I can see that some of the advertising of the American Optical Company that has been done in the Saturday Evening Post and other journals has been good advertising in that they are attempting to educate the public that they should have professional examinations for the care of their eyes, while I can see other types of advertising that would incriminate certain individuals to a certain extent.

For instance, I am opposed to the type of advertising that is done by some of the optical companies, as what you might term as price—or I would term as price advertising, and to much of the advertising of course that goes on in a number of our newspapers throughout the middle west, which I am opposed to, so that I would have to qualify it to say that if you can draw the attention of the public to professional examination, that that type of advertising might be all right, but certainly not the type of advertising which you have in mind. Perhaps I should say that.

Mr. Daugherty:

Q. You have already testified that you feel that if a person has defective vision and needs visual care, that they [fol. 694] should start in the office of the professional practitioner?

A. That is correct.

Q. Are you opposed to any type of advertising that will cause that person in need of eye care to go somewhere else in search of eye care?

A. Yes, I am opposed to that type of advertising, yes, except you understand now that the advertising that the American Optical Company and the Bausch & Lomb Company have put out in some of the larger journals I believe has helped to draw the attention of the public to the fact that they may need eye care.

Q. I am not——

A. And to seek professional advice.

Q. I am not familiar with that advertising, but that advertising does not attempt to cause the public to go into a non-professional place in search of eye care, does it?

A. Oh, absolutely not. I don't think so.

Q. Doctor, as an ophthalmologist do you also feel that ophthalmologists or optometrists should not receive rebates or kickbacks from opticians?

A. I have never received one in my life.

Q. Do you feel that a law which so prescribes is a good [fol. 695] law for the benefit of the public?

A. Yes, so far as I am concerned that is true.

Q. Do you feel, Doctor, as an ophthalmologist that it is good for the public health and the public welfare and good for visual care of the citizens of any state for it to be unlawful for an optometrist or an ophthalmologist to permit an optician to solicit business for them?

A. I don't see how an optician can solicit business for an individual. I can see where, if someone walked into an optician's shop and said, "I need an eye examination and I don't know where to go," the optician might have a list of names.

Q. Wouldn't that be a referral?

A. Well, no more than the referral would be that, to come back to the original thing, that the optician must say to the patient the eye examination must begin in a professional office.

Q. Well you know what I am talking about——

A. No, sir, I do not.

Q. —when I say that professional men do not solicit business?

A. That is right.

Q. Do you believe in that principle?

[fol. 696] A. I certainly do.

Q. Do you think that is good for the profession?

A. Good for the profession?

Q. Yes.

A. Yes, I think it is good for the profession.

Q. You think it is also in turn good for the public welfare?

A. Well I don't know about that for sure, but I believe that it is good for the public welfare provided the public can be educated, you see.

Q. Well we are getting back to the question as to whether or not you think that the care of defective vision should be done professionally.

A. Yes, I believe I have already stated that very definitely.

Q. All right.

A. That the care of defective vision should be done professionally.

Q. Then you know that professional men do solicit, don't you?

A. That is correct.

Q. Then do you think that it is good for the public welfare, for optometrists and ophthalmologists to be denied the opportunity or the right to permit opticians to solicit their [fol. 697] professional services for someone in need of eye care?

A. I don't quite understand the question, really, because it is a lot too involved. You understand now so far as——

Q. Let me ask it to you this way——

A. If you can put it simply, why it would be easier.

Q. You have agreed that care of defective vision should be done professionally.

A. Correct.

Q. As a professional man you agree that you should not solicit business?

A. Right.

Q. Do you then feel that in your opinion, since you think eye care should be treated professionally and that you should not solicit, that you should not solicit through the optician as well as anyone else?

A. No, you should not solicit through an optician.

Q. Or anyone else?

A. Or anyone else, that is correct.

Q. And do you think such a law is good for public welfare and good for the visual care of the people of a given community?

[fol. 698] A. Yes, I presume. I don't see how you can though, as I said earlier, how you can prevent the circumstances of an individual going into an office and have their optician say, "We cannot give you a pair of glasses; you have to go some place else and seek professional care first," and the individual will say, "Where shall I go?"

Now the only thing that the optician can do is to give you a list of names.

Q. Well that is not solicitation under the question I put to you.

A. I see. Well I believe that part is all right, because I have had patients referred. I practiced in New York for a good many years, and thank goodness, my name used to come up occasionally when I first got out of the Navy, and on some of these I got an occasional patient.

Q. Doctor, perhaps you don't quite understand the general trend of my questions. They pertain to whether or not you feel basically that visual care for defective eyesight should be handled commercially or should be handled professionally.

A. Well I have already answered the question that it should be handled professionally.

[fol. 699] Q. Well that is what I say, I think you don't understand the trend of the question.

Mr. Harvey: Counsel, I think that the doctor has been in such a professional vacuum that he does not understand the fighting in the street that you are referring to.

Mr. Phillips: I will add that I don't blame him.

The Witness: So far as I am concerned——

Mr. Phillips: Is there some way you can ask him more definitely what you are driving at?

The Witness: So far as I am concerned the majority of people that I deal with, all the people I deal with are professional people. The opticians that I have are professional opticians. They do not advertise. They never seek any-

thing except the prescriptions that come their way, and they do not solicit business, other than perhaps to display frames in the window, and that is all, and even there the situation is nothing compared to the display of most of the business establishments that we are well acquainted with. It is a very minor display comparatively.

Mr. Daugherty:

Q. Again, in the interest of seeing that defective vision is treated professionally, do you feel that ophthalmologists [fol. 700] or optometrists should hire themselves out to the lay person or lay group and make eye examinations for such lay person or lay group?

A. Never.

Q. Do you feel that that arrangement is bad for the public welfare with reference to visual care?

A. I feel that that arrangement is bad for the public welfare.

Q. Do you likewise feel that the reverse of that is for the good of the public welfare, in that lay persons are prohibited from obtaining or making eye examinations through the employment of an ophthalmologist or optometrist on a salary or commission basis?

A. I got lost in that one. Will you repeat it?

Mr. Phillips: I object to that question on the ground there is no issue involving that particular phase of this activity, involved in this lawsuit.

Mr. Daugherty: Will you read the question, Miss Molle?

(Question read by the reporter.)

Mr. Phillips: The question of the propriety of corporate practice through licensed practitioners is not involved in [fol. 701] this lawsuit, and therefore we object to that line of questioning as being irrelevant and immaterial.

Mr. Branton: And in order not to interrupt, may it be understood that our objections will go to his entire line of questioning dealing with the matter?

Mr. Daugherty: Of course this is under the Federal Rules. You can make any objection you wish at the time of trial.

Mr. Branton: Rather than interrupt you every minute here.

Mr. Daugherty:

Q. Now will you answer the question?

A. Do you mean by the question that an optical company hires an ophthalmologist or an optometrist to do certain functions for them, and to lawfully put them in the business of eye care? Is that the question?

Mr. Daugherty: I think I put my question properly. Will you read it again and we will see if you understand it? I didn't limit the question.

(Question read by the reporter as follows:)

"Q. Do you likewise feel that the reverse of that is for the good of the public welfare, in that lay persons are prohibited from obtaining or making eye examinations through [fol. 702] the employment of an ophthalmologist or optometrist on a salary or commission basis?")

The Witness:

A. Why I believe that is wrong for lay groups to employ an ophthalmologist or an optometrist to give eye care. There are a few exceptions, however, in certain areas, and that is, we will say, in the insurance group in New York. Now the insurance group in New York City hires certain people to help them do some of their eye examinations, which are done.

Mr. Daugherty:

Q. Well, Doctor, you are going far afield.

A. Well——

Q. We are interested——

A. You are going far afield too as far as I am concerned, you see.

Q. Well I am merely asking you if you feel that eye examinations by an optometrist or ophthalmologist should be made by such person while on a salary or a commission for some lay or commercial group, or whether or not the ophthalmologist or optometrist should make his eye examination as a professional service.

[fol. 703] A. The eye examination should be as a professional service.

Q. And this professional service should be free from any commercial control?

A. The professional service should be free from commercial control. I agree to that.

Mr. Harkey: May I ask him one question?

Mr. Daugherty: Go ahead. I think I am through.

Cross-examination.

By Mr. Harkey:

Q. Doctor, do you think that eye examinations should be conducted in a portion of a retail establishment, the main purpose of which is devoted to the commercial sale of merchandise?

Mr. Branton: Excuse me. Same objection, please.

The Witness:

A. I feel that the ophthalmologist should not be in direct association nor with any optical company. He should not have his office in the building—I mean it could be in the building, but not in the same office space as an optical company.

Mr. Harkey:

Q. And your same answer would go to an optometrist——

A. That is right.

[fol. 704] Q. ——having office space in a retail office?

A. Having office space in a retail office, that is correct.

Mr. Harkey: Back to you then.

The Witness: Off the record, that is what we are trying to get rid of in Iowa.

Mr. Harkey: How about having that in the record, "That is what we are trying to get rid of in Iowa."

Cross-examination.

By Mr. Daugherty:

Q. Doctor, you feel that the public welfare is served whenever you can keep examinations of anything as precious as eyesight on a strictly professional basis?

A. Yes, it should be on a professional basis.

Q. Do you think that is good for the public welfare and public health of the citizens of any given community?

A. That is right. I am in favor of anything that will improve public health, and of course there are many ways in which information can be gotten to the public, as we talked about a little while ago.

Our best way in medicine is through the public health [fol. 705] services and through the entire public health service group at county levels and other places in which public information—the public is informed that so-and-so is available, that such eye examination is available, and where it can be obtained.

Mr. Daugherty: I have no further questions.

Cross-examination.

By Mr. Harkey:

Q. Doctor, in general is it not true that certain standards of unethical and unprofessional conduct on the part of a licensed optometrist or a licensed ophthalmologist may result in their having their right to practice those professions taken away from them? In other words, an optometrist or an ophthalmologist who is operating on a non-professional or commercial basis can have his license taken away from him, is that correct, sir?

A. In most states that is correct.

Q. Do you think that the law ought to require that non-professional people who are working rendering service as a part of visual care should have the same restrictions placed upon them as are placed upon those who are qualified to [fol. 706] render visual care?

A. Well I would think so. That is why I am in favor of course of a registration and examination law for opticians.

Q. And you think the same restrictions on advertising and solicitation of business should apply to all people who deal in optical appliances as applied to ophthalmologists and optometrists?

A. I still don't object to the advertising of the American Optical Company.

Mr. Daugherty: But they are not selling.

Mr. Harkey:

Q. Doctor, I think we distinguished that earlier as being ethical educational publicity.

A. All right.

Mr. Phillips: Read the rest of the sentence too, while you are reading that.

Mr. Harkey:

Q. In other words to distinguish bait advertising, is it not true that the advertising which you approve does not result in a person entering a specific establishment?

A. That is correct.

Q. Now, Doctor, you are opposed to any type of advertising that would cause a person who thought they might need visual care to walk into the doors of a specific non-profes- [fol. 707] sional establishment?

A. That is right.

Mr. Harkey: That is all.

Cross-examination.

By Mr. Daugherty:

Q. Doctor, do you know how many professional men are in attendance at this convention, this national convention?

A. Not for sure, but there are——

Q. What is your best estimate?

A. Oh between three and four thousand.

Mr. Daugherty: Thank you.

Mr. Phillips: Doctor, I have just a couple of questions I would like to ask you.

The Witness: Yes.

Redirect-examination.

By Mr. Phillips:

Q. You testified that you had no objection, in your opinion there was nothing against the public interest in a professional optician of the type you use having modest window displays, is that correct, sir?

A. That is correct.

[fol. 708] Q. Do you know whether the professional opticians whom you use insert their names as professional opticians in telephone directories?

A. Yes.

Q. Do you have any objection to that kind of advertising?

A. I have no objection to that kind of advertising.

Q. Is your objection to advertising directed to that kind of advertising which is misleading or induces persons to look to unprofessional people for professional care?

A. That is correct.

Q. But advertising which doesn't have that tendency, such as you have seen in your own professional opticians, is it in your opinion objectionable?

A. That is not objectionable.

Q. Yes, sir.

Mr. Phillips: That is all, sir.

Mr. Daugherty: I object to all of those questions as being leading and suggestive, and not being the testimony of the witness but rather the testimony of the attorney.

Mr. Phillips: Any further questions?

You have a right, sir, to read the deposition and sign it, [fol. 709] or you may waive the reading of it and signing of it.

The Witness: I prefer to read it if it is at all possible.

Mr. Phillips: The clerk would provide for that, and you would have to come to Chicago in order to sign that.

Mr. Daugherty: We will agree that if it can be done, that the clerk can mail it to the doctor at his home.

The Witness: That is right.

Mr. Daugherty: And he can sign it.

(Discussion outside the record.)

Alson E. Braley, M. D.

[fols. 710-712] Certificate of Notary Public to Deposition.

[fol. 713] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

DEPOSITION—October 21, 1953

[fol. 714] DR. ALBERT N. LEMOINE, JR., of lawful age, produced, sworn and examined as a witness on behalf of the plaintiffs, deposes and says:

Direct examination.

By Mr. Phillips:

Q. Will you state your name?
A. Albert N. Lemoine, Jr.
Q. Will you state your profession or occupation?
A. Ophthalmologist.
Q. Will you state, Doctor, the degrees you hold?
A. I have an A. B. and an M. D.
Q. From what universities?
A. A. B. from the University of Kansas, and M. D. from Washington Medical School, St. Louis.
Q. Will you state the professional associations of which you are a member?
A. All of them?
Q. The most important ones.
A. Well, the County Medical Society, Wyandotte County, Kansas State, A. M. A., and the Kansas City Eye, Ear, Nose and Throat, American Academy of Ophthalmology, Association for Research in Ophthalmology, Pan-American Congress of Ophthalmology, Diplomat of the American Board of Ophthalmology. That is all I can think of right now.
Q. Are you associated with the University of Kansas?
A. Yes.
Q. In what capacity?
[fol. 715] A. Professor and chairman of the department of ophthalmology.
Q. As chairman of the department of ophthalmology, is it your duty to instruct in ophthalmology in the medical school of the University of Kansas?
A. Yes.

Q. Have you practiced, or are you practicing, are you a practitioner of ophthalmology?

A. Yes.

Q. Doctor, are you familiar with the general scope of the activities of opticians?

A. Yes.

Q. You are, of course, or are you familiar with the general scope and practice of ophthalmologists?

A. Yes.

Q. Do ophthalmologists prescribe eyeglasses?

A. Define what you mean by prescribe.

Q. Do they issue a prescription for the lenses for eyeglasses?

A. Yes.

Q. Would you state what is included in the prescription for lenses for eyeglasses issued by an ophthalmologist?

A. I can state for myself, and I think probably the majority of men in this area, that it consists in the strength of the correcting lens only.

Q. Does that prescription contain any data respecting the frame?

A. Not in my practice, and I think that relatively few men in this area do that, prescribe as to a type of frame, or anything of that nature.

Q. In your judgment is it advisable to include data re- [fol. 716] specting frames in a prescription for eyeglasses?

A. When dealing with a dependable optician, which is the obligation of an ophthalmologist, I don't feel it is necessary at all.

Q. Does your prescription for eyeglasses contain the interpupillary distance?

A. No, not my regular prescriptions.

Q. Where do you expect the interpupillary distance of a patient's eyes to be determined?

A. By the optician.

Q. Does your prescription for eyeglasses contain any data respecting the angle of the lens to the frame, or the earpiece?

A. No, it doesn't. Basically, you can't determine until after a person has a frame. It has to be adjusted to their desires, so you can't write it in a prescription. You don't know what it is going to be for an individual patient.

Q. In your opinion, Dr. Lemoine, what are the proper functions of an optician?

A. I think the proper function of the optician is, No. 1, to select a proper frame for the patient; No. 2, to correctly measure the p. d.

Q. By "p. d." you mean interpupillary distance?

A. Interpupillary distance, and also proper measurement [fol. 717] of the height of the bifocal in the particular frame that is selected. The third one is to see that the dispensed lens, in other words, the finished product that he gets before he gives it to the patient, is properly ground to the prescription; and the fourth one is to see that it is properly adjusted, realizing that—I think it is all-important, in my patients—that particularly in bifocals they be told that it may require two or three visits, because it is an individual adjustment to the patient, and it is their function to work with these adjustments after the initial adjustmen., it is their function to make future adjustments on the frame.

It is the physician's obligation, though, that if the patient is dissatisfied or has discomfort in any way, that the patient be so instructed, that they are to return to the physician.

Q. Will you describe, Dr. Lemoine, how the optician takes the interpupillary distance?

A. Well, that will vary widely according to the optician. Actually it boils down to one thing. It is a measurement of the distance between the two eyes. Now, there are innumerable gadgets that may be used to measure this, and it varies from optician to optician. You can do it with such a simple thing as a plain ruler, or any of the more fancy gadgets, but [fol. 718] it consists in measuring the distance between the center of the pupils of the two eyes and, further, they should measure the distance of the eye individually from the center of the nose.

Q. Is it difficult to take that measurement, Doctor?

A. No, just take the ruler where the line is on the cornea, just measure that distance, it comes right out on the ruler.

Q. Is that a task which can be performed, in your judgment, by a skilled craftsman?

A. Well, to me that is what an optician is, a skilled craftsman.

Q. Doctor, you have testified that one of the functions of an optician is to select a proper frame?

A. Yes.

Q. Will you tell us what procedures the optician employs in selecting the proper frame?

A. Well, this whole matter of frame selection—there is no such thing, in my opinion, as a single frame to fit any patient. It is becoming progressively more apparent that with the wide choice of frames, the cosmetic factor with the patient is the all-important one. In other words, the patient can select a frame that they wish as far as color and shape, and almost without exception either a frame is available that can be adjusted to that patient, or the frame can be altered to fit that patient, such as putting pads on one that didn't [fol. 719] have pads, or removing pads from one that did have them. I think it is very important in selecting a frame that the patients themselves be allowed to make a decision as to the shape, basically size, unless they go too far off as to too large or too small, and certainly as to color.

Q. Why do you think that is important?

A. Well, I think it is important because if you have to wear glasses you had just as well wear something that you like the looks of, and that is one of the greatest problems for everybody in the fitting of lenses is to satisfy the cosmetic desires of the patient. But it can be solved, and it is just a matter of having an adequate selection and then the optician can go right ahead and, either with adjustment of the frame or some addition, make any frame fit any face.

Q. Does the selection of the proper eye size involve technical skill?

A. When you get right down to it, I think the selection of the eye size is dependent altogether on the frame that the patient selects. In other words, that is why, as far as I am concerned, I would never write an eye size down, because what may look good in measuring it on a patient's face, when you actually select a frame it may not work at all. If the patient decides, for example, they wish to have a rimless glass, as a general rule the eye size will have to be larger [fol. 720] than if they select a plastic or frame of some other type, because if you order the same size lens in a rimless glass and a frame glass, they are going to look entirely different on the patient's face. As soon as the lens is put in a frame, a full frame, it is going to look much larger, and

that is why I feel quite strongly and, in fact, around here we stress to our residents that if they are using an optician for their work, that they should not limit him by stating the eye size, because that automatically handicaps him in his selection of frame, because if the patient wishes a plastic frame or decides one of the shapes is a little better so far as he is concerned, if you specify the eye size you may make it impossible for him to give the patient what he wants. Actually there is a very wide latitude in the size of the lens that a patient can wear, and we can look back to, you might say, the Ben Franklin days, when lenses were much smaller, and yet fulfilled their function perfectly all right, till we get clear up to the aviator's and golfer's with the very large goggle lenses. All of them will perform the function perfectly all right.

Q. So that, if I understand you correctly, Doctor, this wide tolerance in eye sizes means that there is large room for discretion?

A. Yes.

Q. In granting the desires of the patient?

A. Oh, yes, very wide.

[fol. 721] Q. Does the selection of the bridge size involve a technical problem?

A. Very definitely, and the problem is, in my experience, definitely one of measurement being the thing that may give you more trouble than anything else, because when you get to the bridge, what you can measure, just look at anybody's nose, the bridge of it is one width and the base of it is another width, and it depends on the type of frame they select as to where that is going to rest on the nose.

One of the greatest problems we run into is the prescribing of safety lenses where they require such a measurement, and the patient may be allowed to get a metal frame or a plastic frame, and if you put down a definite measurement that is measured in the accepted manner without trying the frame on a patient's face, too often the frame is either too narrow or it is too wide, and I still think the only good method of doing it is not a measurement, but rather the trying of the particular frame on a person's face and seeing how that fits their nose, and there is no way, to my knowledge, devised that you can measure that at all. It is more

or less a trial and error and depends altogether on the frame construction and the type of pad, whether they use a pad or no pad, that determines that factor.

Q. Would you say, Doctor, that it is a fitting operation?

[fol. 722] A. Yes, it is just a mechanical fitting.

Q. Is it comparable to the fitting of a pair of shoes to the human foot?

A. Same thing exactly you have to fit it so that it is comfortable to the person's nose. That is the basic thing first, then minor adjustments can be made by bending the frame or adjusting the pads.

Q. Is the optician qualified, in your opinion, to perform these functions you were describing?

A. In my opinion he very definitely is. He can do a lot better job than I can.

Q. Why do you say that he can do a better job than you can?

A. Basically because he is limiting his work to that. I mean that is all he does is fit those frames. An ophthalmologist, in the majority of instances, the refracting aspect is only one phase of his practice, and most of us are unable to devote sufficient time to it, and as far as I am concerned, it is a technician type of a job, or craftsman type of job, and does not require medical training or anything else to do it. It is something that a person that does it every day should be able to do very well.

Q. Will you describe the technical problems, if any, involved in mounting lenses in frames?

A. Most of the frames they just snap in and take one or [fol. 723] two screws. The rimless glasses have a hole you put a screw in. Some of them have a clamp, but the only thing that can happen is that you might break a lens in putting it in. There is no particular skill. You see that all the time, patients come in, their lenses drop out, they put them in themselves.

Q. Will you describe the technical problems involved in duplicating a lens?

A. Well, in merely duplication—you mean a broken lens or something of that nature?

Q. Yes, sir, or duplication in the sense of maybe a companion——

A. (Interrupting:) It is a very simple thing to duplicate a lens, because it is done with a lensometer, which is an optical gadget that measures the two focal areas of the lens, and it simply consists of putting a fragment of the lens or the whole lens in the lensometer and focusing—most of them are devised as lines, a series of lines in one axis and one line in an opposite axis, although some of them are dots. Just consists of looking in, getting the lines of focus of one meridian on the dial, one side of it tells you the strength of each meridian, and the second side records the axis of astigmatism. You can teach it to a nurse or anybody else. In fact, most men that I know, optometrists and ophthalmologists, don't do it themselves, they have their technicians [fol. 724] or nurses or some assistant trained in the mechanics of telling you what the lens is, and once you get that figure, what that fragment or lens is, you write a prescription just as you wrote the original prescription, and it is ground from that prescription.

Q. Does the operation of the lensometer involve skill?

A. It all depends on what you mean by skill; not very much skill. For example, around here, we can take our student nurses on the floor, and most of them can be shown how to do it.

Q. How long does it take you to teach them how to do it?

A. Forty-five minutes, an hour, something like that. If anybody has any mechanical sense at all of turning handles, that is all it is, and looking in to see where there is something to focus.

Q. Will you tell us the factors concerning the lens which the lensometer determines?

A. Well, it tells two things. One of them is the strength of the lens and the other, the second feature of it, it will determine the axis of astigmatism. The matter of the axis of astigmatism you have to consider in the light that if it is a broken lens and a very small fragment, the only thing that you can determine is the spherical and cylindrical power, you can't determine the axis because you don't know the position that fragment was in the full lens. However, if you [fol. 724] have a full frame where the lenses are not broken, you can not only determine the sphere and cylinder of the lens, but also determine the axis of that cylinder within that

particular frame. But in fragments you can't determine. You can tell what the cylinder is, but you can't tell where it was sitting originally.

Q. In your judgment, Doctor, is the performance of the functions which you have described in duplicating lenses, is that a function which may be competently performed by opticians?

A. Yes.

Q. Now, Doctor, are there any other important functions of an optician in addition to those which we have discussed, which involve technical skill?

A. I think we have discussed them, as well as I can offhand think of it. We have discussed most of their functions. Maybe someone else can think of one, but I can't.

Q. Will you describe the technical problems involved in determining the angle of a lens to the frame, in the frame?

A. You mean the problem of making that adjustment or determining what it should be?

Q. Determining what it should be and making the adjustment.

A. Well, No. 1, in making the adjustment, that depends on the frame. If it is a metal frame the adjustment is merely made by bending, by a pair of pliers and bending. If it is a plastic frame, it sometimes entails dehinging the lens [fol. 725] and filing off one edge of it, because the plastic won't bend in the usual manner. Neither one of them is a particular problem. In one case you take the pliers and bend it, in the other take a file and file it off, then bend the hinge.

Now, as to determining the proper angle at which it is to be set, I know of absolutely no method that can be predetermined. The only thing that you can do is put it on an average position, and then you ask the patient to wear it for a few days, and then if they have difficulties, to come back and tell you, and then it is a matter of telling—they say they see the frame down here at the bottom when they read, it is just a matter of tipping it a little bit more. As far as I am concerned, it is something that can't be determined before a person gets the glasses. It is something that has to be made after they get the glasses.

Q. Will you state what the factors are which are impor-

tant or what the effects are which result from the angles of the lens which are important?

A. Well, the effect, except in extremely high corrections, which is an unusual thing, extremely high cylinders and spheres, the effect is really, from a practical standpoint, nil or minimal, I should say, not nil.

Q. Is that because of the tolerance?

[fol. 726] A. It is because of the tolerance of the eye and the acceptance of the person to change their habits. The theoretical idea in the tip of the lens is particularly true in a bifocal where you have two optical centers. The theoretical idea in tipping the lens is that when the eye is turning in a downward position for reading, the visual axis will pass through the lens perpendicular to its surface rather than at some off angle. But in my experience, from the practical standpoint that is too much tilt for the average patient. The average patient does not like that much tilt in the lens. Where you would theoretically calculate that it would take a tip of about 17 to 20 degrees, most people will not tolerate that much tip, they want it more nearly a flat surface.

Then, again, that is extremely variable according to the patient's face, their reading habits, if they hold it up here (indicating) it is one thing, down here it is another, and you can't pre-determine that, you just have to let them sit in the office, when you check them you say, "Hold the card just the way you want to read," and about half the time you can depend that they won't put it that way, they are in an artificial position and they won't put it in that spot, they will come back, say it is too high or too low. So, again, it is an individual quality that is determined only after they get [fol. 727] their glasses, and the proper function is that when they have trouble you make the adjustment to that individual.

Q. By having trouble do you mean that the eyeglass is at an angle which is uncomfortable?

A. The patient coming back and stating that they don't feel comfortable, that is the whole thing. The words they use to describe it, they just are not satisfied. You might put it that way; and one of the things you must think about when they are not satisfied is the fit of the lens and the tip of the lens is one of the factors.

Q. Now, Doctor, in your judgment is it necessary for an optician to perform these various functions which you have described, to have the training of an opthalmologist?

A. By definition, no. The ophthalmologist by definition is one trained in medical and surgical treatment. The fitting of a glass to a face has absolutely nothing to do with medical or surgical treatment of a patient, and the definition, as far as I interpret it, itself, tells you that they have that training.

Q. In your judgment, Doctor, is it necessary for an optician to perform these functions to have the training and education of an ophthalmologist?

A. No, definitely not.

Q. An optometrist performs some of these functions, does he not, Doctor?

[fol. 728] A. The optometrist in my opinion has two functions. Function No. 1 is to refract the eye for glasses; function No. 2 is the mechanics of adjusting the lens that the optician does, so he is really functioning in a double manner, as far as I determine the optometrist's function. His special training entails the prescribing of the lens, the refracting of the patient, which an optician, by definition, should not do, and is not trained to do, but when one determines the strength of the correcting lens by what is commonly called the refraction, that is his function, and it is something entirely different to the fitting of the frame, and as soon as you start fitting the frame to the face, whether you are an optometrist or an ophthalmologist, in my opinion you are simply functioning as a dispensing optician. That is what that service you are rendering is.

Q. In your opinion, Doctor, is it necessary for an optician to know how to refract eyes or issue eye prescriptions to do his job competently?

A. Definitely not. I mean by pure definition of the way you do it, that is not a function that I would accept at all for an optician to do.

Q. Doctor, do ophthalmologists generally duplicate lenses for eyeglasses?

A. Well, that depends altogether in the community. In a [fol. 729] city such as Kansas City, or any larger city, I know of none that do. In a small community by necessity they must. So you can't give a flat statement. It depends

altogether on the size of the community and whether an optician's services are available.

Q. In Kansas City, for example, where an optician's services are available, and should a patient ask an ophthalmologist for a duplicate lens or to duplicate a lens, what would he do?

A. If your patient calls and asks for duplicate lens?

Q. Yes, sir.

A. You have two alternatives; one of them, if they know the optician to which they went, just tell them to go back and get it. Now, most all companies in this area have copies of records going back for years, and there is usually a card on each patient and each subsequent change as made, and if they wish to duplicate a lens I rarely send another prescription for it, if they go back to the original optician. If they don't know or they say they think they went to some optician, I tell them to stop by and the girls will have a prescription for them. But we have some very reliable ones here and it has presented no problem as to the necessity of rechecking the patient or anything like that. Strange as it may seem, one of the greatest problems is two or three years [fol. 730] later for a person to remember where they went to get them.

Q. If the patient went directly to an optician who employed the lensometer, would he be satisfactorily treated?

A. Yes; I mean the optician with the patient's glasses can adequately fill the prescription.

Q. In a city such as Kansas City, Doctor, if a patient asked an ophthalmologist for a duplicate set of eyeglasses, what would the ophthalmologist do?

A. I think the average ophthalmologist would just say go back—the first thing they ask them is if their present glasses are satisfactory, and if they say yes, you say just go back to the optical company or optician and have another pair made. That is true in Boston, too. My experience basically is for the Boston area and the Kansas City area, and we have exactly the same set-up as there. Now, if it has been a long period of time, you may request them to come in and be checked up again.

Q. Doctor, do competent opticians in Kansas City and Boston do that kind of advertising?

A. Oh, yes, sure, but it is very—usually it is just quiet. Now I mean it is usually a very modest ad. It just says "Dispensing optician," and the name of the company. They don't go for full page ads, or anything like that.

Q. But they do use modest forms of advertising?

A. Oh, yes, sure.

[fol. 731] Q. Do such modest forms of advertising appear in newspapers?

A. Yes.

Q. Do they appear in telephone directories?

A. Yes.

Q. Do such opticians use window displays?

A. If they are on the ground floor, they do.

Q. In your opinion, Doctor, is the use of such modest forms of advertising contrary to the health and welfare of the public?

A. No, I don't think it is at all.

Q. Doctor, is it customary for opticians to maintain a stock of frames, lenses, and other paraphernalia of eyeglasses in their stores?

A. Well, the frames, yes, they usually have quite a selection of frames. As far as lenses, it will depend greatly upon the volume of business. As a rule most of them will do what they call stock the simple corrections, but I think in this area in the majority of instances they probably do not widely stock the lenses themselves except for the simple ones, but rather have them ground individually to the prescription. It makes no difference which way they have them. It is mostly a matter of capital investment whether they have a whole lot of ground lenses on hand or not.

Q. One further point, Doctor. Is the optical center of a lens blank pre-determined by the manufacturer?

[fol. 732] A. No, no, they can be adjusted.

Q. Of a lens blank, I asked.

A. Now, if you mean the lens blank before grinding, it is simply a parallel surface, lens has no power, and the center of that lens is determined by where you grind the center of your correction. In other words, if you have a large sheet and you grind it clear over here (indicating), there is going to be an optical center over here somewhere. Now, it is indirectly pre-determined because the blanks are made of

relatively small size, so you can shift it only so far, so it will be within a relatively small range.

Q. Doctor, you have testified that it is the normal function of an optician to perform the fitting and adapting of frames to the face of the patient or customer, is that correct?

A. Adjusting, did you say, or adapting?

Q. Fitting and adjusting.

A. Yes.

Q. In the event that an optician makes an error in fitting or adjusting the eyeglasses to the face of his customer, is the customer likely to sustain any physical injury?

A. No, I know of no case on record that a poorly fitted lens ever produced any organic damage to the eye. It just produces discomfort, and in a mild degree, at that.

Q. Doctor, is there any relation, in your opinion, between the competency of an optician and the occupation of his [fol. 733] landlord?

A. What is that?

(Question read.)

Q. Let me explain that question, Doctor. The statute with which we are concerned in this litigation prohibits any person engaged in the retail business from leasing space in his retail store to a person engaged in the occupation of prescribing glasses, eyeglasses.

A. Well, in so far as the competency of the individual, I think that is the way you worded the question?

Q. Yes.

A. It is my feeling that a person can work under any conditions anywhere and still be, you might use the term intellectual honesty—the working conditions have nothing to do with it. If you look at it in that aspect, competency is an individual quality in a person, as far as I am concerned, and if they have character they can work anywhere, middle of the street or any place, and they can still retain their ability to work perfectly all right. So I would say in a general manner that way it should make no difference, because I still think that the whole thing is a personal function, and whether I like the idea or not is a different thing, but I see no reason why a person couldn't be completely competent working in a retail store or anywhere else, as far as his competency is concerned.

Q. In your opinion, would your statement include an [fol. 734] optometrist?

A. I think it applies to anybody in any function of life. If they are ethical and have high standards, they can be competent any place, and if they aren't that way it won't make any difference where you put them, they are not going to be.

Q. Doctor, are you familiar in the course of your work with the University of Kansas with the numbers of ophthalmologists in general avaiiable in the mid-western areas?

A. In the mid-western areas?

Q. Yes, sir.

A. Honestly, it would be more of a guess as to how many ophthalmologists are available in the mid-western area.

Q. Would you be able to say whether there was an adequate supply of ophthalmologists or an inadequate supply of ophthalmologists? Would you be able to say that much, of your knowledge?

A. Well, I think—I would like to have it pinned down a bit more in what you mean by ophthalmologists being adequate. Do you mean by that statement are there an adequate number of them to take care of all the public if all other groups, the optometrists, for example, were put out?

Q. No, sir, by that statement I mean are there an adequate number of them to take care of the people who request the services of ophthalmologists?

A. I think either there are or quite close to it. I say that [fol. 735] because I know of people that could do more work in the area, that is, some are busier than others. Certainly in our locale around here I think there are very few areas in which it is not available to people if they wish it.

Q. Would you be able to make the same statement if ophthalmologists were required to engage in the detail of fitting glasses to the face or supervising the fitting of glasses to the face?

A. That would be absolutely hopeless. The ophthalmologist couldn't begin to do it. If you had to fit the glasses to the face, take that mechanical function, you could figure you would have to reduce your practice by a good 50 percent.

Q. In the event that that were to happen and the ophthal-

mologists were required to thus reduce their practice, where could those patients receive their eye examinations?

A. Well, the most serious thing that would entail from such a problem is that you would have an inadequate number of men to take care of the diseases of the eye. That would be the most serious thing. Now, the refracting aspect, checking of glasses, I don't know for sure, but I assume that there are sufficient optometrists for the mechanics of just fitting glasses, that the matter could probably be solved for fitting glasses, but there certainly would be a serious prob- [fol. 736] l m arise from the surgical and medical treatment basis, because it depends a lot on the office but in my practice the medical and surgical treatment constitutes 80 to 85 percent of it. If I had to do all this other thing it would cut down markedly on that. There is nobody then that could take over the function of that which is part of the total eye care of patients as I see it.

Q. Doctor, you have testified that the ophthalmologist is near or close to the saturation point with respect to the number available. In your opinion, if the requirement that ophthalmologists adapt or fit eyeglasses to the face were imposed, would the ophthalmologist tend to eliminate the examination of eyes from his practice and concentrate on the treatment of eye diseases because of the importance of the factors of which you have discussed?

A. Certainly a percentage of them would. I don't know how high the percentage would be, but I mean you would have absolutely no alternative. In my own particular case, if such a situation ever did exist, there is no doubt what I would do. I would quit the refracting aspect because my training and my duty to the public, as I see it, is far more in the medical treatment than it is inspection of glasses.

Q. If ophthalmologists quit the refracting aspect, is there any group other than optometrists who would be able to [fol. 737] perform that service for the public?

A. I don't know the technicalities of the law, but I don't know of any other group that could legally do it.

Q. In the event that the ophthalmologists, by virtue of the requirements of such a law, were to reduce or restrict their examination of the eyes, would that have any effect upon the business of the opticians?

A. You said in the event that the ophthalmologists were required——

Mr. Phillips: Read the question, please.

(Question read.)

A. Naturally it would because they are dependent basically upon the ophthalmologist's prescription to be in business.

Q. Do opticians receive business from optometrists?

A. Probably you will find some place where it might happen. I doubt very seriously that there will be very many cases of it, though. The ones that I know personally, some four or five in Kansas City that I know personally, I have never heard them mention that they got prescriptions from optometrists, because in this area the practice is that the optometrist does the refracting and in addition to that he does the fitting of glasses. That is just assumed, that is what he is going to do.

Q. Would it be your opinion, then that anything which induces or causes ophthalmologists to restrict the number of eye examinations they gave automatically result in [fol. 738] elimination of business for the optician?

A. It would automatically, because I am sure that I could safely say that over 90 percent of their business is from ophthalmologists.

Mr. Phillips: That is all. Mr. Daugherty will have some questions to ask you.

CROSS-EXAMINATION.

By Mr. Daugherty:

Q. Doctor, are you familiar with the legislation involved in this litigation as to which you are testifying?

A. I have heard about it in a general manner. As to specific details, I am not certain as to them. I have never read the law, if that is what you mean.

Q. You have never read or studied the law?

A. I have never read or studied the law.

Q. Doctor, I believe you are not only an instructor in ophthalmology, but you are likewise a practitioner?

A. Yes, I am half-time teacher and researcher, half-time practitioner. I practice outside the institution, it isn't an institutionalized set-up. My private office is outside of the hospital.

Q. You run your own private office where you have your own private patients?

A. I have; have the financial obligation, and everything. In other words, it is completely separate from the University.

[fol. 739] Q. Now, you have testified about writing prescriptions after making an examination. What do you usually do with your prescriptions, Doctor, after you write them?

A. The No. 1 question I ask them is if they have a preference of optical companies or opticians which they would like to go to. In this particular area rather a high percentage of the patients seem to be indifferent, they say it makes no difference to them. Because I practice at the Plaza, which is, you might say, a suburban area, I then tell them—give them their choice of, you might say, some four or five optical companies and opticians that have been satisfactory in their work, and tell them I prefer them to select one of that group, and it is as much as anything geographical. If you wish to go downtown, go there, or the Plaza or 63d and Brookside, or Prairie Village. It is a matter of trying to help them geographically, but I try to control it only in so far as going to places where I know I can get dependable service.

Q. Do you customarily have the patient run to your office after receiving glasses from the optician?

A. Routinely, no, if they go to one of the optical companies I have confidence in. My instruction to the patient is if they have any difficulties of any type or any complaints after 10 days or two weeks, that I wish to see them in my office, and working on that basis—I formerly did, but it [fol. 740] becomes a burdensome problem and when dealing with reputable opticians and optical companies, the problem is minimized completely on that basis. But I am reasonably certain it works satisfactorily because practically all the ophthalmologists in Kansas City are on my staff here, and we are quite close friends, and if the patients are not satis-

fied they end up in some other office, and you find that there is very little shifting of patients because of dissatisfaction, so the system in this area seems to work satisfactorily.

Q. Do you elicit any assurance from your patient when he leaves your office with your prescription that he is going to some optician that you know——

A. Do I what?

Q. Do you get any assurance from your patient that he is going to an optician that is dependable?

A. Yes, my patients, by far the majority of them, I tell them where these are, and I ask them which one they want, and only a single name is written in longhand on the back of it. I do not use any type of printed prescription in so far as the address of an optician on it, and I write it in longhand, and I ask them which area they want to go into and which one of them they want, and that is the one address that they have, and I am quite certain that by far the majority of the patients do go to that place. The ones that [fol. 741] don't go to it are usually very—I mean if it doesn't work out and they come out, they usually tell you they didn't go where you recommended.

Q. Do some of your patients return to you after their glasses are received from the optician for a check-up?

A. Last year in our office we kept track of it, and approximately between five and seven percent of the patients had some type of difficulty in which they did return with questions. Now, most of them were due solely to very marked changes in their glasses, and they hadn't adjusted to it. In my experience last year I had only one patient return in which there was an error in the prescription. When they come back I check the lenses to see that they are ground properly. I had one case in which I couldn't exactly blame him, because my 5 was exactly like a 2, the way I put it looked like 1.50 instead of 1.20. I told him I thought he should have been able to figure it out, but that is the only mistake I had last year in the grinding of a lens.

Q. In some of your examinations and prescriptions do you sometimes prescribe glasses on an off axis?

A. Off axis meaning off axis astigmatism?

Q. Yes.

A. Well, quite frequently there will be, because the term

"off axis" means that the axis of the cylinder is at 180 or [fol. 742] at 90, and as generally used the term "off axis" is anything around—180 or 90 is off axis.

Q. My question was you sometimes prescribe glasses that are off axis?

A. Well, now, I want you to describe axis. Do you mean what I am talking about, 180 or 90?

Q. Yes, we are talking about the same thing.

A. Yes, if that is what the refraction takes, I do prescribe it.

Q. Do you put that information in your prescription to the optician?

A. You have to, you can't put a cylinder down without an axis. I mean if you just write cylinder, no axis, they can't fill it, they have to call you and ask you what it is.

Q. I understand that. These questions may seem a little bit stupid to you, but I am just asking you if you do put that information in a prescription?

A. You have to, yes and if you don't you can be sure they will call you up and ask you what axis it is supposed to be in.

Q. Do you ever put in your prescription any information as to the distance that the glasses or lens should be placed before the eyes?

A. That, again, in my opinion, is a measurement that cannot be put down, because it depends altogether on the frame selected, and the determining factor is usually the [fol. 743] eyelashes, how far they protrude, and you can't determine that until you have the lens mounted in the frame or at least you have the frame, I should say, without the lenses, in front of the face, and see whether it interferes or not. So you can't pre-determine that unless you go so far as to limit them to a single frame and have that frame—put it on their face. You have to measure it on the patient's face. I don't believe that should be done.

Q. Do you ever put in your prescriptions any data as to the distance the lens should sit before the eyes?

A. No. The only data I put on it is the sphere, cylinder and axis, and the bifocal, if required.

Q. Plus information about the axis if it is off axis?

A. Well, that is the axis, the sphere, cylinder and axis.

Well, that will be a number, anywhere from zero to 180.

Q. Doctor, has it been represented to you by anybody that this Oklahoma law puts the dispensing optician out of business in Oklahoma?

A. No.

Q. You don't labor under that impression?

A. I haven't read the law, so I don't know what your particular law does.

Q. You don't have that impression at the present time?

A. I don't know.

Q. If I should take one of my lenses down to an optician and it is an off axis prescribed lens, and it is broken, an attempt is made to duplicate that lens, would the optician [fol. 744] know how to put it back in the frame properly?

A. Your lens is broken?

Q. Yes.

A. How much of it is left?

Q. Well, let's say half of it.

A. Half of it. If there is a half of it, he might be able to. It all depends on whether he can put the lens in the lensometer, in the original frame. If you break the lower half of your lens off and you went in he could determine if the upper part was still in position, because then it is in its frame. If, however, you went in with just the jagged triangular fragment from some place in the middle of it, he would be unable to put it in unless he had the prescription.

Q. The lensometer itself can't show you the correct axis if it is off axis?

A. Sure it can, if it is mounted in the frame.

Q. I say not in the frame, though, Doctor.

A. Not in the frame. Now, let's see, the lensometer cannot show you——

Q. The correct axis, if it is off axis, if you don't have the frame, just the lens?

A. Nothing can tell you that unless it is mounted in the frame or unless you have a sufficiently large segment of the lens that you could be reasonably certain. I me. [fol. 745] if you have a broken rimless glass that has two holes ground in it, and the top is perfectly flat, then you could put it in and get it probably within one to two degrees

of it, you wouldn't be off more than that, if you have sufficient periphery to tell you where to put it.

Q. But there might be cases where you wouldn't have enough of the lens?

A. In my experience, they will never fill such a prescription. They will call the physician and if it is a person that is traveling through——

Q. What about Oklahoma, can you testify about conditions in Oklahoma?

A. I have no idea of Oklahoma, I am testifying in this particular area. I know it, because——

Q. The point is——

Mr. Phillips: Let him finish.

A. I know it because of experience with the optical companies. When a traveler comes here, for example, goes down to one of them, they will call up, they will say they have a fragment, wonder if it would be safe to fill it, or something of that nature, till they got home. So I feel that by far the majority of them in this particular area are very good about not filling such a prescription unless they are quite certain that they can determine the axis.

Q. If they undertook to fill it, it would be a bad practice [fol. 746] for the eyes, would it not?

A. No, not for the eyes, now. If they——

Q. Well, for the patient then, in order to be properly fitted with glasses, it would be a bad practice?

A. I think, again, it would depend entirely on the circumstances. If it was a business man, he had to have something and he was——

Q. I am not talking about that.

Mr. Phillips: Let him finish his answer.

A. And he was told, "This may not be proper, but if you have to have it until you get home, or until you get an examination—it may not hurt the eyes, and it may save a business man a big deal. We run into it most strikingly every summer when people go to Europe and break their glasses in Europe, to get them something filled to get them by until they get home; or break them on a boat, something like that. It won't hurt the eyes, but it isn't a practice——

Q. The man would still not be properly fitted with glasses,

would he, if he has a pair of glasses with an incorrect axis?

A. Personally, I object to the term "properly fitted." The tolerance of the human eye for a lens is remarkable. In fact, it is practically fantastic when you practice medicine and you see what people are wearing and what they can wear with no complaints at all. So actually one of [fol. 747] the—to my way of thinking, one of the fallacies that exists in the whole matter of refraction is the assumption that the human eye is exactly like a photographic camera, and you give the eye no tolerance. The known fact is that anybody that really works with the eye knows that there is quite a tolerance. That tolerance is what can save a person when they get in jams like that.

Q. Do you have any opinions as to how often a person ought to have his eyes examined, once he has been fitted with glasses?

A. I have quite strong opinions on that. It is based on several things. No. 1, the age of the patient. Glasses do two things, either make you see better or make you feel better. They don't cure diseases, or anything else. From say seven or eight until roughly 45, unless a person has a very abnormal pair of eyes, the average person can go seven to ten years between examinations, unless they develop symptoms in the meantime. Most of them can go seven to ten years. After the age of roughly 43 to 45 for the next ten years, they need a check usually about every two to four years, they will change somewhere between two and four years. After the age of 55 to 60, it is my feeling that they probably should be checked about every two years, not for their glasses, but to check for glaucoma and diseases of senility. In other words, checking their [fol. 748] tensions, and so forth, to try to pick up diseases early. But in the greater span of your life it is unusual that you need a change in less than three to five years, and in your middle segment of life, in your middle teens to your forties you can usually go eight to ten years unless you have a very abnormal pair of eyes. Of course there are always individual exceptions.

Q. Doctor, in your opinion, do improperly adapted glasses bring about a nervous condition sometimes in a patient?

A. Well, the term "nervous condition" is so ambiguous that I would like to have just what you mean by a nervous condition.

Q. Well, I think you will have to answer that. You are a doctor, I am not. I am merely quoting from a case where——

A. Well, nervousness is a subjective symptom of the individual. Rarely can a physician of any type, anybody, objectively look at a patient and say, "You are nervous." It is a sensation that a patient has. Now, some people get nervous driving a car, some people get nervous at a party. Wearing glasses with a poorly fitting frame, something like that, can make some people nervous, but you can be reasonably certain of this, that the person who comes in and is all nervous because of the glasses, one who comes in to get little adjustments, to the optician, every week, you can be quite certain that that person has quite profound nervous tendencies. That is just one of them. That same per-[fol. 749] son usually has an upset stomach and a lot of other things that goes with it. Nervousness is an entire person, all the things. One factor can be improperly adjusted glasses, but it is usually just a very little facet in an entire personality problem, and I think that is one of the biggest problems we face today in specialization of medicine, is a grasp of the entire patient and not just their glasses or not just their stomach or not just this or that. But medicine in the last three or four years particularly —our journals are coming out more and more with this realization that many of these things we used to thing were important are part of a total personality, a so-called nervous patient, and certainly in an institution like this, one of our greatest problems is to look at the patient as a whole and not as a bunch of little factors, and my own opinion is that the so-called nervousness with glasses is, to me, a very important tip-off that there is a lot more to this than glasses, we had better look into this patient a lot further and find maybe thyroid and other diseases to which was the tip-off, that they just responded by being nervous with their glasses because most people tolerate—you wear glasses and I don't know what your reaction is, but all you have to do is walk down the street—some are bent, have grease all

over them, it never bothers them. The average person is usually phlegmatic to the dirt, and so forth. Whenever [fol. 750] you get a nervous patient, worry about them.

Q. These tip offs you speak of, are they often found by examination of the eyes and eye grounds?

A. No, you never find them there. You find it by carefully quizzing the patient, with reference to their other medical illnesses, that is where you find it.

Q. Isn't it so that you sometimes detect early stages of hardening of the arteries by looking at the eyes, examining the eyes?

A. Well, again, that is a matter of opinion. In my opinion you don't detect the early stages, definitely. The most important thing that is brought out in medical literature is that what you see in the blood vessels of the eye is not reflected elsewhere in the body. There is only one place in the body that there is a reasonably good correlation, that is the kidney; no correlation at all between the blood vessels of the eye and of the brain. They can have marked hardening of the eye, fairly normal brain vessels. That is proven by autopsy.

Q. Am I wrong then in the understanding that certain circulatory disorders in the early stages are better discovered through an examination of the eye grounds?

A. Certain circulatory; now, you may have a specific one in mind that I can't think of right offhand. As a general rule, no. When you get the changes in the eye, the most [fol. 751] striking example is high blood pressure. If you make the diagnosis when they have the changes in the eye, the one thing you can be sure of, the patient is not in an early phase of it, it is a severe hypertension, and he is in the late phases, and it is unfortunate he wasn't picked up before that. As a rule, if it becomes apparent in the eye there is quite extensive bodily involvement. Now, sometimes they are picked up by the eye because they haven't had a routine physical check-up, but it usually is a manifestation of a well advanced disease when it shows up in the eye.

Q. Well, then I am wrong when I have been told that you pick up a lot of bodily difficulties which show up for the first time in the eye?

A. Now, there are two ways to look at it. You won't pick them up in the eye if the person has been reasonably careful in their physical examinations. It is just like a person comes in with a diabetic retinopathy; you make a diagnosis of diabetis; you question the patient; he hasn't been to a doctor in 25 years. Diabetic changes don't occur in the eye for 15 to 20 years, so if you take a hundred people you may find some you pick up, but if you go back carefully it is usually because of inadequate previous physical examination.

Q. But if they are examined by an eye doctor chances are they may discover some of the disorders and can send them [fol. 752] to the proper doctor for treatment?

A. It is very unusual in this general area, including our clinic patients, that we ever pick up a diabetic that does not know they have diabetes. They are aware of their disease, and it is quite unusual. In fact, Monday night we had a discussion at our Journal club about that, and we asked the men how many they had picked up that had diabetes that didn't know they had it. There were only four people seen in the last year not aware of it. Although we do occasionally see them, most of them have had the general condition recognized before you see it. That doesn't mean you shouldn't look at the eye, by the way.

Q. I didn't think you would testify to that, Doctor. I am, naturally, not a doctor and I have to base my thoughts on what opthalmologists tell me. I am not basically familiar with these things, but I am told that a frequent eye examination is good as a means of detecting other bodily ills that may show up in the eyes.

A. Well, now, if you go back you will recall that I said that after the age of 55, from the age of 45 on that rarely should they go more than four years. It is only after that that you get into most of the diseases you think of. In general, you rarely run into these diseases, they are diseases of the over-age. They are protected between the ages of 43 and 45 because their glasses change and they have trouble reading. The one patient you worry about the most is [fol. 753] after he is 55 or 60, when they get along all right reading they won't come in so you can check them. They should be checked every two or three years after the age of 55.

Q. Of course opticians are not trained or qualified to make examinations of the eyes or diagnose conditions from the examination of the eyes?

A. In this area I know of no optician that ever looks in a patient's eye. They are not trained for that.

Q. Well, my question was are they trained or qualified and not whether they ever do.

A. Are they what?

(Question read.)

A. They are not trained for studying eye diseases.

Q. Thank you, Doctor. You have testified that ill-fitting glasses do not create any organic damage to the eye. In your opinion will ill-fitting glasses result in a loss of efficiency on the part of the patient?

A. Well, that expression of efficiency is, again, to me, a very hard question. Efficiency has a lot more to it than glasses, or anything else. One of the greatest things, I think, is a will or desire to do something. It probably is true that some people are less efficient, but I feel quite strongly that we are tending to overdo this matter of efficiency in reference to eye functions, and particularly a lot of the new testing devices coming into industry, because it [fol. 754] is a rather abstract thing that you are working with, and this whole matter of efficiency and what makes a person efficient and not efficient. I think in some cases it would be true it would reduce the efficiency, but I think in the majority of cases if you would study the whole patient, there are a lot of things more important than glasses.

Q. Glasses would contribute?

A. And these other things are probably considerably more important in most cases.

Q. Doctor, I know you are not familiar with this law, but I would like to get your professional personal opinion as an expert in the field of visual care as to whether or not certain of these provisions are salutary and beneficial to the public health and welfare. First, I believe you have testified in your opinion the only legally qualified or competent persons to make eye examinations are ophthalmologists or physicians and optometrists?

A. Well, I think that might require a little—wait a minute. You said legally qualified, didn't you?

Q. Yes.

A. That cuts out what I was going to say. An optometrist can fit the glasses, and so forth, but as to the other aspect of it I think—legally, if you are talking about who can legally do it, I think probably optometrists and ophthalmologists are the only ones that can do it, according to [fol. 755] the law.

Q. Is that the law of Kansas?

A. As far as I know, Kansas and Missouri both.

Q. Are chiropodists qualified to make an eye examination, for example?

A. Are they qualified or can they legally do it? Definitely they are not qualified.

Q. That is all I want to know, whether they are qualified. Do you agree with a provision of this law that provides that no unqualified person should visually correct for compensation the eyes of another?

A. It depends on what you mean by visually correct. If you mean by visually correct the fitting of the frame to the face, I don't think it requires ophthalmology training. That is, as far as I am concerned, total eye care is that and that particular phase of it can be done by a craftsman, technician, whatever you want to call it, and it is all part of your eye care, eye problem.

Q. If that means to make an examination and write a prescription, do you agree that that provision of the law is good for the public when it provides that a person other than an ophthalmologist or a physician or an optometrist, or that no unqualified person should be permitted?

A. To what?

Q. To make an eye examination and write a prescription.

A. Yes, I agree with that particular part of it, to make the [fol. 756] examination and write the prescription, I would agree to that.

Q. You appreciate that some of this language I use, Doctor, is sort of legal because it comes from the law, and if you are not clear on it, if you will invite definitions I will give you the interpretations I think——

A. It is just like getting into a medical aspect, you are at the same disadvantage. That is why I am asking the questions, because I am trying to get an interpretation.

Q. Doctor, the practice of ophthalmology is a profession, I take it?

A. Yes.

Q. And you practice it professionally of course, as a medical doctor?

A. As a medical doctor, that is right.

Q. Do you feel that when a patient comes to your office with defective vision that the usual professional and confidential relationship is established between you and the patient?

A. When a patient comes in? Oh, yes.

Q. The same as a client comes to my office, that relationship is established, you feel that it is professional and confidential?

A. That is right, with reference to the examination, sure.

Q. Do you feel as a professional man that you more or less take charge of the ills of the eyes of your patient and [fol. 757] undertake to remedy any defects that you find?

A. Do I undertake—I would like to get that again.

(Question read.)

A. Yes, that I assume as my responsibility.

Q. You feel a professional responsibility to your patient, of course?

A. Oh, yes, particularly with reference to eye disease.

Q. Doctor, this law has a provision in it that an optical supplier on a written prescription from either an ophthalmologist or a physician or an optometrist may interpret the same and measure, fit, adapt, adjust and dispense glasses, with the provision, however, that the professional man concerned, whether he be ophthalmologist or optometrist, shall remain responsible for the full effect of any appliances which may be furnished the patient. In your opinion, do you feel that that is a good provision of the law for the protection of the public?

A. The question is the one writing the prescription, that they are responsible to see they get what is ordered and that it fits properly?

Mr. Brown: We object to the question as an improper attempt to quote the law. You may go ahead and answer.

(Question read.)

A. In my opinion, any person that examines the patient and writes the prescription, it is his obligation, law or [fol. 758] no law, that the patient be his responsibility, and if the patient is dissatisfied, that it is his responsibility to take care of the patient and to make sure what is wrong.

Q. I am sure you recognize that it is a professional responsibility. Doctor, this law has a provision in it that it is unlawful for ophthalmologists or optometrists to receive rebates from opticians. Do you find any objection to that provision of the law, in the interest of the public health and welfare?

A. You won't find any objection from me, and if you will look in the records you will find out our office doesn't take them. I feel very strongly about the whole matter.

Q. You feel that this provision in the law is good, then, for the public?

A. Yes, sure.

Q. The law further provides that no ophthalmologist or optometrist shall permit an optician to solicit business for them. Do you find any objection to that law?

A. Yes, I would object to that. I think that they are perfectly legitimate retail business and that just in the whole basis of free enterprise they should be allowed to use modest advertising, but not false and misleading advertising. That is the only way they can solicit that I know of.

Q. Well, I am not talking about soliciting business for themselves, I am talking about soliciting business for [fol. 759] a professional man?

A. For a professional man?

Q. Yes. I don't think you understood my question, Doctor. An ophthalmologist, of course, is a professional man. Do you agree that professional men do not ethically or should not ethically solicit business?

A. I don't think ophthalmologists should.

Q. Just like lawyers shouldn't?

A. Yes. They shouldn't advertise, or anything like that.

Q. And surgeons shouldn't?

A. That is right.

Q. Then do you find any objection in this law when it just simply provides that opticians should not be permitted to solicit business for ophthalmologists and optometrists?

A. I do, because I think it is a retail business. I think it has nothing to do with professional groups.

Q. Now, are you talking about the professional service?

A. I don't think—in the first place, I don't think, as far as I am concerned, in the strictest sense of the word, that you can consider an optician a professional man. He is in a retail business, and he is a craftsman like a watchmaker or anybody else.

Q. If this provision has no relation to the optician's business——

A. (Interrupting) Well, a retailer of glasses then, I will put it that way.

Q. (Continuing)—but rather is intended to make it un- [fol. 760] lawful for an optician or any other person, for that matter, to actively solicit professional business for a professional man.

A. You have got me confused, because I don't see where the optician is in the picture. I don't consider him a professional man, to start with.

Q. I think if we could discuss it without question and answer form—I think the basic premise, Doctor, that you need to understand is, and I believe you will concur in it, is that professional people do not solicit business, and if they do so, in most professions, if not all professions, it is considered unethical, and in most instances is grounds for revocation of their license, the purpose being that they should give professional attention to the business of their clients and not be engaged in solicitation of business, commercial applications to their client's business. Do you agree that professional men should not solicit their patients, or clients?

A. As I interpret what you are saying, I agree that a doctor and a lawyer should not advertise in any manner at all and to me law and medicine are two examples of professional men. Now, I can't quite tie this into the dispensing aspect of glasses, because that, to me, is not a professional service. In other words, that, to me, is in a retail [fol. 761] aspect of the thing and I can't quite tie these two together is where I am confused on this thing.

Q. You have heard of ambulance chasers, haven't you?

A. Oh, sure.

Q. You know what they do commonly?

A. Not in detail.

Q. They go out and get business for lawyers. In other words, the ambulance chaser seeks the patient out and sends him to the lawyer, rather than letting the patient pick a lawyer of his own choice. That is called, I believe, solicitation of business. Now, do you agree that professional men should not permit people to solicit business for them?

A. I don't think when you come to the matter of a retailer advertising, he is soliciting business for anybody particularly except for himself, that he wants to sell his merchandise. I can't personally tie up this one aspect which as I interpret it, is retailing glasses, as having anything to do with the professional services involved in it. He is just saying if you have this thing, I am available for this service, to fill your prescription. I don't see that it is soliciting business in any manner or means. Personally, I don't approve of a set-up, for example, of a dispensing optician selecting two or three doctors and sending them to those doctors. I don't approve of that set-up. Most of them in this area, the reputable ones, as far as I know, don't; they [fol. 762] give a list of the entire group.

Q. You are getting right to the point now. Don't you agree that these doctors should not permit or allow these opticians to solicit business for them?

A. Well, I think that if a person comes in to a strange city that it would be perfectly acceptable for them to give a list of all the recognized people, not pointing out anybody.

Q. Sure, but there I don't think we understand what we mean by actively soliciting business and actually referring people to doctors. Of course you understand doctors——

A. (Interrupting) I haven't run into it because I haven't had anybody do it like that. I am unaware that the thing even exists. I am sure in some areas it does.

Q. We all recognize that professional people who don't solicit business depend upon satisfied patients, clients, and friends referring business to them. In my opinion, this provision is certainly not aimed at that type of activity, but rather it is aimed at just what you testified about, wherein——

A. (Interrupting) I don't know how the law reads——

Q. (Continuing)—wherein a professional man may per-

mit or allow an optician to solicit business for him. My question to you is whether or not you think that is right or wrong, whether you think it is proper or not.

A. I will start with I don't think you can give a flat [fol. 763] answer because I think you are asking two questions in one. One of them, I think they should be completely free in their advertising as long as they are honest, and so forth. I personally don't approve of them selecting a single individual or a limited number, but I think it should be possible for them to supply the list of people in the area that are capable of supplying the medical care, but not advertising in the paper.

Q. All right, sir. Thank you, Doctor. Let's take a case —say I don't wear glasses, and I find my vision to be giving me some trouble, I probably need an eye examination, may be in need of glasses. Do you think I ought to go to an ophthalomologist or a physician or an optometrist, or do you think I should go to an optician?

A. Well, to start with, to my knowledge, we have already ruled out one of them, I don't think one of them can do it, the optician. He certainly isn't trained in the examination. As far as your optometrist—ophthalmologist situation is concerned, I think everybody is completely aware it is a confused issue, there are all kinds of opinions on it, and with properly trained ones in either situation, that you can get adequate care provided the standards are high enough.

Q. I termed them as a group, and I don't intend to break that group down, but my point is I have defective vision, and I need an examination for glasses. Should I go to a [fol. 764] professional man or should I go to an optician?

A. Why, you can't go to an optician for examination; at least none of the reputable ones I have ever heard of would even give you one.

Q. Who should I go to?

A. Go to an ophthalmologist or an optometrist. That is your choice as an individual.

Q. Doctor, do you feel that an ophthalmologist should make eye examinations as an employee of a lay person or a lay group, but should he make them personally, professionally, confidentially?

A. Well, I think that you are bringing in two problems; one of them is basically a matter of ethics, interpretation of ethics. As far as their ability to do it, I think they can do it either way. As far as ethics are concerned my feeling is that they shouldn't. However, the trends of the country show—I mean the groups that are employing doctors, for example, Kansas City Garment Workers, in their home medical care program, that entails a lay group hiring ethical doctors. So that is why I don't think you can give a flat answer to the proposition. Medically, they can certainly do it under any circumstances, and they can remain confidential, they can do the whole thing. I just personally wouldn't do it, and I would not encourage my residents to [fol. 765] do so, but I think they are competent to examine under that set-up.

Q. I see your point about the Garment Workers. But isn't it so that in that case the doctor is responding to a request for professional services, for which he is paid, and that he does give those people professional services?

A. He is strictly under hire, that is all he is, hired by them at so much per month.

Q. Full time?

A. I can't say full time. I know there are places, Kaiser's set-up, for example, is full time.

Q. In that case the doctor doesn't offer his services then to the general public, where he is engaged full time to deliver his professional services to an individual?

A. We have many examples of that. How about the Mayo Clinic? Nothing but a lay organization, all full time men rendering professional service.

Q. I am exempting from my question, or will now, hospitals and things of that kind.

A. I mean the same thing applies. A man can give excellent care, a man can perform very capable services, but I think it is a matter that is being thoroughly discussed in medical circles as to whether it is ethical or not.

Q. Let me give you another example. Do you think that an ophthalmologist should hire himself out to an optician [fol. 766] on either a salary or a commission, and make eye examinations for that optician?

A. Again you get back to the same basic problem. I think

a completely competent man can do it. Personally, ethicwise, I don't approve of it.

Q. Why don't you approve of it?

A. Why don't I approve of it? Well, one of the things that I don't like about it is I still am a great believer that it is a free enterprise proposition. I don't like to see people subjugating themselves to somebody else. But I don't think it has anything to do with what a man can do. He can perform just as good services under that set-up. It just goes against my idea of how things should run, and I can't be the one to say whether it is right or wrong.

Q. Do you see any danger of a commercial or selling influence over-riding the professional approach and attitude that a professional man should take to his patient? Do you consider that a danger?

A. I don't think the danger is any greater than it is to a person who sits in his office by himself, because it all goes back to one thing, the individual, and a man can open an office by himself, and we all know in your profession and in my profession that you can be completely unethical, it has nothing to do with your surroundings.

Q. Doctor, you are a highly professional man and a highly ethical man, I am satisfied of that. But in your opinion [fol. 767] might some other practitioners, if they are permitted to hire themselves out to commercial interests, be prone to not give proper professional care to someone that comes in for an eye examination and be influenced by the commercial attitude and desires of his employer?

A. I don't think that is necessarily so at all.

Q. You don't think that there are any people that would do that?

A. No, and I think that you can picture right offhand an individual who might do that, a very qualified person who has a physical defect that limits his ability to work, where he doesn't want to have to worry with the operation of an office, and so forth, and go out on a strict salary, do excellent work where he knows he will have to work particular hours, he doesn't have the obligation of financial overhead, and so forth. I can see where a very good person in poor health might accept such a situation. I wouldn't do it personally; and I don't think it would interfere one bit,

and he could still be the most—an excellent practitioner. I am not saying they would necessarily be that, but I certainly don't think it rules out that possibility by a long shot.

Q. It doesn't rule it out completely, but it doesn't guarantee that commercial influence might not be exercised over that man's professional service?

[fol. 768] A. You sure don't have that guarantee in any other set-up, either. You aren't guaranteed, in your profession or mine, going to a person in a private office, that he won't be attracted by the same commercial thing. You see, that is the whole thing, you can't guarantee yourself in either situation. It goes right back to the individual; the individual and his moral principles is what you go back to.

Mr. Brown: Do you have patients waiting for you, Doctor?

A. Since nine o'clock.

Mr. Daugherty: I believe if you have patients waiting, Doctor, that I will conclude my examination. Thank you very much.

Mr. Brown: Did you have anything else, if he didn't have patients waiting?

Mr. Daugherty: Possibly so.

The Witness: It can be taken care of, if you have any pertinent questions.

Dr. Daugherty: We will stop our examination.

Mr. Phillips: The doctor says he will make arrangements if you desire to ask any more questions.

Redirect examination

By Mr. Phillips:

Q. You say that on the back of your prescription you write the name of an optician after you have given the [fol. 769] names of several reputable opticians to your patient?

A. Well, I usually do. Sometimes I give a patient the pencil and they write the address down themselves. I give them the choice and then they usually say, "Well, I can't remember it," so either I will jot it down or sometimes they have the pencil in their hand and jot it down themselves.

Q. Is that for the convenience of the patient in remembering the address?

A. So they won't have to look it up in a telephone directory, or forget the name.

Q. You don't consider that a direction to a patient to go to that one?

A. No, I don't care about it. That is why I refuse to use printed prescriptions. It is just for their convenience.

(Discussion off the record.)

Mr. Phillips: Doctor, you have the right under the law to read and sign your deposition, or you may waive it and have it submitted by the court reporter simply as she transcribes it. What do you want to do?

The Witness: I am going to be out of town so quick——

Mr. Brown: Will you waive your signature then?

The Witness: I have to leave town to go to Atlanta, Friday.

Mr. Brown: Is that satisfactory with you?

[fol. 770] Mr. Daugherty: It is simply up to the witness, as I understand.

Mr. Brown: Then you will waive your signature under the circumstances?

The Witness: I see no alternative.

Mr. Brown: The attorneys will also waive it. You are not going to insist?

Mr. Daugherty: I am going to do whatever the doctor says.

The Witness: I would like to read it, but I don't see any possibility of doing it, because I am going to be leaving. I will be out of town until a week from Monday. There is no possibility of checking it, whether I want to or not.

(Witness excused.)

By agreement of counsel and the witness, signature of witness to said deposition was expressly waived.

Beryl L. Finley, Notary Public within and for Jackson County, Missouri.

[Seal.]

Notarial Certificate to Deposition (omitted in printing).

[fol. 776] In The United States District Court

[Title omitted]

Deposition—October 14, 1953

[fol. 777] Mr. Phillips: This witness has specifically requested that we insert in the record the statement that he is not appearing for or on behalf of or is in any way associated with the parties to the present lawsuit, and that his appearance is solely as a disinterested expert to testify under subpoena on problems concerning which he is questioned.

Dr. Sheard: That is right.

Mr. Phillips: Is that correct, Doctor?

Dr. Sheard: That is correct. That is what I asked.

Dr. Charles Sheard, called as a witness on behalf of the plaintiffs, having been first duly sworn on oath, deposeth and saith as follows:

Direct examination

By Mr. Phillips:

Q. Will you state your name?

A. Charles Sheard.

Q. Will you state your profession or occupation at this time?

A. At the present time, is that what you want?

Q. Yes, sir, if you will.

A. I will give you the present title that I hold as Director

[fol. 778] Emeritus of the Division of Biophysics of the Mayo Clinic, and Professor Emeritus under the Mayo Foundation at the University of Minnesota. I am inactive, but I am still a member of both.

Q. All right.

A. If you want to know furthermore what I have done and do——

Q. I do, sir.

A. For the last five years I have gone south to New Orleans, I will be going again this year, about the first of December, and will be there in the Department of Ophthalmology of the Graduate School of Medicine of Tulane University. This will be either the fifth or sixth year. I am not sure.

I still in a way am interim dean of the Los Angeles College of Optometry, and then when the dean was secured during the course of the school year, I was no longer dean, but I am still concerned with them.

This fall I am teaching a course in opticianry in the Rochester Junior College of Rochester, Minnesota. I say that for this reason, that this year and in several other years I have taught in various colleges and gave instructions in the [fol. 779] three fields of ophthalmology, optometry and opticianry.

Q. Will you state the degrees you hold, Doctor?

A. Yes. I will pass by the A.B. and the M.A. degrees, and come to the Ph. D. degree, the Doctor of Science degree, and the last degree I got was from none other than Los Angeles College of Optometry, as an Honorary Doctor of Ocular Science.

Q. How long were you with the Mayo Institute, Doctor?

A. I have been five years emeritus. Counting that, almost exactly thirty years.

Q. Are you a member of any professional societies or organizations?

A. Yes, of a very large number. You will find some of them listed and you have got to get Who's Who now to find out all of them, but as far as vision is concerned——

Q. Yes, sir.

A. Well, to go abroad, I am a fellow of the Optical Society of Great Britain, a feilow of the Ophthalmic Institute in England.

And coming to this country, I am a fellow, honorary fellow, since I am not a practitioner of medicine—I have the basic science training, but I have never practiced medicine [fol. 780]—that is why I had better emphasize the fact that I am an *honorary* fellow of the American Academy of Ophthalmology that is meeting here.

I am a fellow of the Research Society of Ophthalmology. I am a fellow of the Optical Society of America. That is the great big overall opticall society. Well, I am a fellow of the American Academy of Optometry. I am a life member of the American Optometric Association.

I have been president of the American Board of Opticianry. That isn't a society quite, but it is a Board of Opticianry, and I am now acting as the secretary of the board, because of my interest in education strictly.

Q. I see. Have you written any texts or papers in the field of visual care, Doctor?

A. A considerable number.

Q. Would you name some, sir?

A. Well yes. As books, I contributed the section on physiological optics to the American Encyclopedia of Ophthalmology, about six hundred pages. That was about 1920. Another section, and reprints—I have all of these as separate reprints—on radiant energy and transmission by ophthalmic glasses. Another on problems of accommoda- [fol. 781] tion and convergence. The first little book was entitled Dynamic Ocular Tests, 1914. Scores and scores, I don't know how many, of smaller articles.

Q. That is all right, sir.

A. But I think there is one thing I should mention in connection with medical physics. I contributed the section on ophthalmic optics as a shorthand statement or condensed statement of all the things that are concerned with these things (indicating.)

Q. You are pointing to your eyes?

A. Well——

Q. You are pointing to your eyes when you say "these things"?

A. Glasses.

Q. Glasses. I see.

A. Physiological optics. In ophthalmology and optometry

I wrote many articles. You will find them in the journals. The one I emphasized was the fact that I had written a text that had to do with all of these appliances, all the physical laws of optics and so forth.

Q. Are any of your writings used as texts in the modern [fol. 782] schools of ophthalmology, optometry or opticianry?

A. I am going to laugh now, and then to say that they all went out of print, so they couldn't be used.

Q. I see.

A. But this year, in my seventieth year, ophthalmologists and the optometrists and the opticians, as a united effort—many have mentioned it to me here in this hotel—have sponsored the publication of a Sheard commemorative volume to include those writings which are no longer available, so that they may be made available to the students. They are quoted, found in the libraries, and the students have to find them there, because they are out of print, most of them.

Q. Doctor, you mentioned that you are secretary of the Board of Opticianry?

A. At the present time.

Q. At the present time. Do you hold any other official positions in any of these societies of which you speak, as an officer or a member of a committee? Let me add to that question, or as a consultant to committees.

A. Well, as an instructor in the Academy of Ophthalmology; and I was an instructor in the courses for a great [fol. 783] many years, but I finally got the gold key, and that was supposed to be—you know what I mean by that; and so we took our place in the honored ranks of those who had served.

Q. Specifically Doctor, are you a member or a consultant to the Committee on Interprofessional Relations?

A. Yes. I organized the first, what I called Interprofessional Relations Committee in Optometry, and was appointed the first chairman, as I remember, in the City of Toronto, at the National A.O.A. Convention, oh, it might be fifteen years ago, I am not sure, and nursed it along and carried it along, hoping to get these men together; with some little success.

Then it was revived. After the 1935 resolution in the A.M.A.—it was known amongst us as the 1935 resolution —was rescinded, which would prevent medical men from in anywise giving instruction or in anywise associating with laymen—since optometrists are laymen, medically speaking, and they are, strictly speaking, to the medical men. Everybody that is not in medicine is a layman. After that was rescinded then the whole movement could be [fol. 784] revived, and it was revived, starting with the Committee on Optics and Visual Physiology of the Ophthalmological Group Society, and then the optometrists and opticians came in and they started the movement over again.

Q. And from the movement of which you speak came the present Committee on Inter-professional Relations?

A. That is right. So presumably the older ones of us had had our experiences, and it was thought wise to keep out of active relations and let somebody else see what they could do, which was a good thesis, but we would always be more or less consultants.

Q. Doctor, from your experience as a member of these inter-professional groups of which you speak, and from your activities in the various associations which you have mentioned, are you familiar with the history of the growth and progress of the profession of optometry?

A. Yes, sir.

Q. Are you familiar with the history and growth of the profession of opticianry?

A. Yes, sir.

Q. Will you trace the history of the growth of optometry [fol. 785] and opticianry to your knowledge?

A. You might have asked me of ophthalmology also.

Q. Yes?

A. And I would have said yes, sir.

Q. Then I will add ophthalmology.

A. Yes, sir. Well, take them in the order you gave them. Optometry. In 1914 there was established in the Ohio State University, perhaps because of my own interests and agitation, a course in visual or applied optics, since there was no law in optometry in the State of Ohio then, that later, as I passed out and went elsewhere, developed into the School of Optometry.

I advocated and was professor in a course of four years duration that gave a college degree in optometry. It was the first course in the world, and I am sure that it is true, that had any such four-year course and gave any collegiate degree in optometry.

It was their professional birth, because prior to that there had been nothing but private schools, six weeks courses, as long as the fellow had some money—maybe you don't want this testimony—but that was a good deal of what it [fol. 786] was.

Q. Doctor, you put into the testimony the factors which you think are of importance.

A. Yes.

Q. In tracing this history and growth.

A. Well it would be a little derogatory, but it was a proprietary school situation; and I have seen optometry grow, I have seen some schools deleted, the same as in medicine, because I could repeat this for medicine.

And I have seen them come into Columbia. Columbia was the first one that had a course of any kind, but that was in the extension department. Well, that didn't have any good standing. This was the first one that had university recognition.

Then in California, the University of California, I have seen that come in, and I have seen these other schools grow and get better and better, longer years of training, that is, the earlier one was two years at the best institution, now five years, and then the proposal of six years.

So I have seen it advance all in one man's lifetime, in probably fifty years. Of course the first law was in 1900 in optometry in Minnesota, so you see it had to develop [fol. 787] in fifty years. There has been a gradual good development.

Now in opticianry there were no courses at all, so I argued if you have got to have the boards of ophthalmology—and there were no such boards when we started these courses in optometry at the university, so that was all born since 1910. I think it might have started then.

I started with many of those men in the early days of instruction. But never mind that, a few, a handful of men that started this very thing that is beneath us in this build-

ing, and I have seen it grow until it got to be a standard three-year course, beyond that of medicine; so in the winter I teach in that kind of a course.

Opticianry had nothing. So the logic was this, how can you have this advancement, on the professional side, and have absolutely no skill down below with trifocals, with contacts, with plastics, with aniseikonia, and all the modern forms of ophthalmic lenses. Aniseikonia is where the image sizes are different, is what it means. The Dartmouth development, and so on, and all of that, and the greater skill [fol. 788] developed here, and these things (indicating) then coming to take care of these conditions, a most intractable condition if it didn't have some basic training in opticianry.

So in 1946, in September, 1946, we established a two-year course in opticianry in the Rochester Junior College. And that was the reason for it.

Q. When the first schools in optometry developed of which you speak, had the profession of optometry as such distinguished itself from its antecedents—strike that out.

A. I think I know what you mean.

Q. Let me ask the question. When the first schools of optometry were developed had that profession at that time segregated itself from any former profession?

A. No. They came out of pretty much the jewelers' stores. That was jewelers and opticians. So in the last analysis every one of them went back, ophthalmology and optometry all go back to the optician. It is the most ancient of the lot.

Q. I see.

A. It goes back even to the fellow who is supposed to have invented spectacles, Salvini d'Armato, he was an Italian, about the thirteenth century, goes way back to that, so that is the antecedent of it.

[fol. 789] Q. Yes, sir. When the optometrist first segregated himself as a profession did he at that time maintain an interest in the dispensing of eye glasses?

A. The correct term in the early years was optometrist and optician.

Q. I see.

A. And the statement on the part of the medical profes-

sion was that he was an optician selling glasses, and that he had no background or training in order to prescribe; and he in turn said that neither did the medical man have any adequate training; and they both told the truth, and they both lied.

Q. Did the optometrist initiate efforts at that time or subsequently to establish their position as a separate independent profession?

A. Yes, yes.

Q. Are you familiar with the developments?

A. Yes, I think I am.

Q. Will you trace those developments, sir?

A. I will try to. You might put this in parenthesis, I am not sure of my dates, but I think that—what I know is that the first law in optometry was in 1900, I know that the [fol. 790] American Optometric Association was formed prior to that, was composed of a group of optometrists—well, of optometrists and opticians.

Well the word optometrist I don't believe existed at that time, but they were called opticians. I know that is true. It is said that a man John Eberhardt of Dayton, Ohio, coined the word. I knew Eberhardt very well. I think he probably did. So it is a word that is an instrument—well an optometer is a measure—a meter is a measure, and op is eye, so optometer is an eye measure, therefore optometry, which is measuring the eyes; so it is logical.

That group started I think about seventy or seventy-five years ago, I may be wrong in my number of years, but the first law was in 1900 which gave them the right to practice legally, that is, it gave them some status.

It was fought by the medical profession, as were most of those early laws fought by them, on the basis that they had no medical training, and that eyes are part of the body, so therefore they should come only under the care of a physician. And, of course their statement is still true that the eyes are part of the human body, and it was a ques-[fol. 791] tion of recognition of diseases.

And that was fought up and down the line, so that some adequate training had to be put in the courses, not to treat nor diagnose disease nor operate, but to gain exact knowledge whereby this practitioner upon the public might be

a fairly safe practitioner from his ability to be able to refer the thing which was abnormal, to the man who might in the medical field take care of it either by improving it or say that it could not be improved; it was out of his sphere. So that it has grown in that manner.

Q. In the course of this growth, Doctor, did the profession of optometry have problems in the development of its professional ethics?

A. Oh yes, many of them.

Q. Will you describe some of those problems, sir?

A. Well they are still with you, some of them. I think probably the two greatest problems, one, of education, formal education, and going into college, those were very definite problems, and what should be included in the course.

Those were problems, but there were the practical problems of whether they should be on the ground floor or up [fol. 792] in an office. If they were going to be professional men, the idea was they should get off the ground floor.

The other problem was that of advertising.

So I said you have still got it with you, although little by little men have tried to come more and more into the professional range of operation, at least on paper, and somewhat more in practice, so the percentage of strictly professional men increases, and those whom we might designate as those who are concerned chiefly with merchandising, less and less; and less and less advertising.

Of course a good deal of the removal of the "Dr. Jones, Optometrist, Eyes Examined Free," which were on the windows and in the signs, and you called him up and "No, we don't charge anything for examination. If you get new glasses, why that is what you pay for."

So it was obviously in many respects a commercial transaction, or at least anybody might feel so.

If you were an honest man it didn't follow that that was true, but it was the outward semblance of it; so that the [fol. 793] two great problems professionally still exist. They exist in medicine. They exist everywhere.

Q. I see.

A. Of the actual professional service, with the deletion of or the minimization of emphasis upon the material thing, and the advertising taboo.

Q. Are the leaders of the profession of optometry today attempting further to eliminate commercialistic factors?

A. Very definitely. Oh yes. There is no question about that. Oh yes.

Q. But they have not been successful completely in eliminating it?

A. To the end of time no profession will ever be successful completely, because you will always have some shysters.

Q. State whether or not to your knowledge it is the prevailing practice of optometrists to this day to dispense eye glasses in the course of their practice.

A. Yes. The case in optometry, it is an all-inclusive service. That is the expression used. It is a good expression. It means visual care.

[fol. 794] Optometry, after all is said and done, is presumed to be the art and science of visual care, and a part of that care should be the competence to refer to the physician. Part of that care should be the problems of clear vision and comfortable vision. Part of that care, as he sees it, is that he should cause those things which will enable this comfort and this clear vision to take place, so he gives an all-inclusive service in which he is pretty much his own dispenser.

Little by little there is beginning to be a departure from this, in which the emphasis is placed more and more, and the colleges are laying more and more emphasis upon a separation of, at least a very definite separation in everybody's mind, that this is a strictly professional act, and here you are, and this is the prescription; that these then are separate and entirely different (indicating.)

Q. You were pointing to your eye glasses?

A. Yes. Entirely separate; so that this is the professional act, just the same as the doctor writes a prescription and the pharmacist fills it; and so it is becoming more and more a case where he would be more of a professional [fol. 795] man and a little bit less perhaps of a dispenser, just as a doctor became less and less of a dispenser of his own medicines.

Q. Now is that, sir, the view which the leaders of optometry are urging at this stage?

A. Yes, indeed. I talked with Dr. Jim Wahl—if you

want this in your record—who is president, and that was mentioned last night. We are all working toward a development of better professional practice and better service to the public through education.

Q. I see.

A. And the deletion of the commercial element.

Q. Right. Now, sir, during the period of development of the optometrist, what if you know was the development of the optician?

A. Yes. Educationally he was zero, scholastically speaking. It was an apprenticeship system. The big companies had the research men, and they developed, Zeiss, for instance, and Von Rohr, and men under Zeiss, the American Optical Company and Bausch & Lomb and Shuron and the others, big and little, they did so much of the surfacing and finishing of at least one side of the lenses.

[fol. 796] So that they had the brains that were presumed to be essential, and this man then bought his lenses, and then he drilled, he edged them and he assembled them, then he mounted them in the frames.

That was all the knowledge that was had, except he had a lot of tables, so that he referred to this table and he got this, and somebody, the boss or foreman told him put that lap on there, so that was the way it was, with no knowledge at all of what was inherent in the making of such.

It was an apprenticeship system with the brains up above, which the lack of brains down below couldn't have done.

Q. I see. And what development has taken place in that system?

A. Oh, as I said earlier in the afternoon, the optometrist and the ophthalmologist and the educators and many sane thinking people saw that it was essential that these men who were finishing the lenses as prescription opticians in the laboratory, wholesalers you will call them, and the dispensing men, needed to know a great deal more about what went into them, some knowledge of what the conditions were, so that they might talk intelligently with the doctors [fol. 797] with reference to the intricacies of the prescription.

They needed to know a great deal more about corrections, about thickness, about effect of decentration, and all of the things that you see constitute ophthalmic optics.

We have got cylinders and spheres and prisms and trifocals and bifocals, so that it becomes then not just a matter of tables; if you have any brains in this work, it becomes a matter of basic knowledge, of which he (the optician) may use none on some occasions, and which he may need all that he has on other occasions, depending a lot on the complexity of the prescription that he gets.

If he were to get simple quarter spheres or half diopter spheres, as we call them, those intricacies wouldn't enter, but if he gets cataract lenses, or if he gets a high powered lenses like mine, and he gets them so they are decentered——

Mr. Harkey: I think this is good. It should go into the record if you don't mind.

The Witness: I don't mind.

Mr. Phillips: Q. All right, go ahead.

A. You come up to the high powered lenses, and mine [fol. 798] are fairly high, about five diopters, and they are not centered, so I will decenter by just tilting (indicating,) and I do that, and he doubles on all these adju tments, the angle, so that you don't put false cylinders in. It is a matter of putting in a cylinder by turning (indicating.) Now I am back (indicating.)

Q. Now, sir, remember that the court reporter isn't getting these motions into the record. If you tip——

A. If I turn the lens like that (indicating) I introduce an element that wasn't there when it was in the right position. A new element was introduced, a cylinder for horizontal astigmatism, so I have warped those pictures back there.

Mr. Harkey: Counsel, I can see from here and you can't, and he inserts that by tilting the bottom of his lens toward his face, was the motion he made, to show how he introduced a cylinder which caused a horizontal astigmatism.

Mr. Phillips: That is correct.

The Witness: And I distorted it, yes.

Mr. Phillips: Q. Now how did you make——

A. Then if I introduce this (indicating,) I introduce what we call a prism.

[fol. 799] Q. I see.

A. Because it is a prism up and down, so I see double, and if it is not well adjusted it is a little bit indistinct and obscure, and I just want to shake my head and try to clear it.

Q. Now——

A. Now the further up it goes in power, the worse these elements are.

Q. How would you correct this tilting which you demonstrated so that the lens is in proper position?

A. All right, if it is done right or as it should be done, the man who writes this prescription, the ophthalmologist, if he wrote it, and the optometrist if he wrote it, should put in his record an order given to the optician, and I said, you remember, if it was a very weak lens, it would be like a penny out of a dollar.

Q. Yes?

A. So you have got to appreciate it goes up, as you see it is the square of the power of the lens.

Q. You are speaking of high powered lenses now?

A. Reasonably high.

Q. Yes?

[fol. 800] A. From two diopters on up.

Q. Yes?

A. Two diopters up, and as it goes up, the more significant the effects.

He then should specify when he made the examination how far his trial lens was from the eye, he should specify at what angle his trial frame had been placed, so that when that was known, if he does it as it should be done—I am not saying; it happens too often it isn't done—the optician then has to be the one that has to judge of all of this by his adjusting, but if it was done, then all of that in the high powered lens would be included.

Q. To correct this obscurity which resulted from your tilting the lens, what would one do?

A. It simply——

Q. Tilt it backward?

A. He would do this (indicating.) He would tilt it this way (indicating,) and then the other way. He would make them nearer straight up and down instead of this way (indicating.)

Q. You are tilting?

Mr. Harkey: He was tilting the cylinder.

The Witness: Now when I am saying——

[fol. 801] Mr. Phillips: Q. You are tilting the lens and adjusting the temples?

A. So we don't mix the two things, as one of the big boys downstairs was doing the other night, the cylinders and prisms.

One is a cylinder, when we roll it this way (indicating,) and we would then adjust until we have distinctness and could read. The other, as to the adjustment, when I was doing this (indicating)——

Q. That is turning the lens sideways?

A. Here is the optical center, we will say, here and here (indicating); But here we are, and that is where I am looking straight through (indicating,) and there is no distortion.

It doesn't make any difference how cheap a lens it is, or expensive, if I am going along what is known as the optical axis, there is no distortion.

One of these gets lower (indicating,) then I put a prism up, and the other gets down, as it would vice versa (indicating.)

Mr. Branton: You are speaking of one lens getting lower [fol. 802] than the other, then you have a prism.

The Witness: Then we have a prism one way in one eye and we have a prism the other way in the other eye; then I see double.

Mr. Phillips: Q. I see.

A. And because my vertical directions won't overcome but a small amount of vertical imbalance, as we call it.

In between that stage of doubleness is that stage of indistinctness and fuzziness. It seems a little hazy.

Q. Yes?

A. So therefore there would be one point, and there it is, it is very definitely right there with me (indicating,) where we are double, and in between there——

Q. Excuse me, Doctor, with your finger you are now moving——

A. I am moving this corner of it further down, and the other one up.

Q. Right, sir.

A. And if my eyes are on the optical centers, or also equally below, then I am in the same territory——

[fol. 803] Mr. Harkey: At this time, counsel, he is tilting his lens in a vertical plane.

The Witness: That is right.

Mr. Phillips: Thank you, sir.

Mr. Harkey: I can see over here and you can't see it from your angle.

The Witness: That is, you can see what I mean, that here are the optical centers (indicating,) and as long as my eyes go down like that (indicating,) there is so much prism in this lens, at this point (indicating,) and there is the same amount here (indicating.) They are both base up. That does not give you the action that I gave you. But it will give you a displacement which has to be learned, how to get along with the resultant partial displacement.

You walk out with a new pair of glasses, and the sidewalk comes up and slaps you in the face, so to speak, as you move. That is because of the fact that they are prisms of equal power in both. Then you have to re-orient yourself, or the public says you have got to get your glasses fitted to you—no; you have got to fit yourself to the glasses, is what they say.

Mr. Phillips: Q. I see. If you were a skilled optician, sir, [fol. 804] what steps would you take to assure that the prisms were in the correct position on the face of the patient?

A. That the lenses were in the correct position.

Q. That the lenses were in the correct position.

A. Well, various methods. First of all you can determine with various instruments that we all have, (and the optician has), where is the optical center, because he can mark the line here (indicating,) where it continues unbroken, he can mark the line here (indicating) where it continues unbroken, and where they intersect will be the optical center.

Mr. Branton: Indicating a vertical line and a horizontal line on each lens.

The Witness: Yes.

Mr. Phillips:

Q. And where they intersect is the optical center?

A. Right. Here we have got a correction. I can't do it with my own glasses. I am visually incapacitated without them. I used a word I shouldn't use; I am not any blinder than I was before, but I just can't see the details, that is all.

The same in here (indicating). I will do it this way, and say I got the lens. Here is a cross. So I look through [fol. 805] until the line horizontal is the same inside and out, so I mark that line. I come up here (indicating) and I mark it through until it continues here. It goes to the left. It goes to the right. Here they cross and that is the optical center.

Q. You are using an instrument now——

A. Right.

Q. —which calibrates your lens?

A. But it doesn't need to be. You see they do have instruments, because you can do it then with accuracy.

Up comes the ink marker, then down here is this line with three dots. You take it the other way, of course, the line.

Q. You do it automatically with that kind of instrument?

A. I can do it automatically with that kind of instrument, but if I need to do it I can do it with a pencil, a grease pencil, and mark where that line is, and mark where it is here (indicating).

Q. Yes?

A. And get a very close approximation to the optical center.

Q. All right, sir. Now you have obtained the optical [fol. 806] center. What else would you do as a skilled optician to assure——

A. You note that on the lens. Then I need to know where —there is a measurement that somebody has got to take— and I said advisedly somebody, because they have got this in the courts, because nobody but an optometrist or oph-

thalmologist could take what is called the P D, big P and big D, or the interpupillary distance from center to center.

Q. Yes?

A. Because then the centres of the eyes, as I look at you, should be on the centers of the lenses.

Q. All right.

A. So somebody, and he is the optician, the one who does it, measures the P D so as to determine where these optical centers shall be placed in this frame.

You can pull them this way (indicating) or this (indicating,) or he has got a bridge that he has got to fit to my nose.

Mr. Harkey: Counsel, now he indicates outward and indicates downward.

Mr. Phillips: Yes, the witness has been indicating outward and indicating downward.

[fol. 807] The Witness: Yes.

Mr. Phillips:

Q. Now, Doctor——

A. I haven't quite finished. So we will go back to what we were talking about.

So understand, he has a series of mechanical and optical and physiological problems to put together. He has to know the P D.

Q. Yes?

A. And that is a measurement that is made.

Q. Will you state how one measures the interpupillary distance?

A. In various ways, with great accuracy by some methods, but the common procedure is the use of a rule, in which you line one edge here (indicating,) and then come here (indicating,) or with a small device that enables light to be used so that you can see where it is on the scale.

You see here is the light (indicating,) and then you read it on the scale, that is, on the instrument or the Zeiss instrument, and which cost you several hundred dollars in the days when they made them, and they are gone, which did it as a telescope would do it, and you got it perfectly.

Or if you wanted to do it you could set up a photographic

[fol. 808] apparatus, and everybody's face was photographed, and his eyes were photographed, and you measured the P D.

Q. With a ruler?

A. With a ruler by the eyes. You could say there are many ways; some elaborate, some simple.

Q. In substance are you saying that the taking of the interpupillary distance is a measurement problem?

A. It is a measurement problem.

Q. Yes, sir.

A. Yes.

Q. These instruments which you described reduce the measurement problem to something definite and something very easy?

A. Something that is easier and more accurate.

Q. Accurate.

A. That is, the easiest one—and with experience, as good—is the simple rule method.

Q. Is that difficult to do, sir?

A. No, it is not, no.

Q. It is important however?

A. It is important, and particularly with a lens beginning to have relatively higher powers, the reason being that [fol. 809] on a very low power lens a millimeter or two isn't going to introduce very much prism, where in a high powered lens it will.

Now I don't think that this should go in. If it does, I will repeat. I will give you the exact way to do it.

Suppose, the average prescription runs lower than two diopters, so I will take the two diopters here, and if I am a millimeter off on the two diopters, and I might be, then the power of the prism introduced would be the power of the lens multiplied by the decentration in centimeters, and it is two tenths of a prism diopter. Two tenths of a prism diopter.

Now this might not make, and would not to my way of thinking, make any difference horizontally, but you begin to get it of significance vertically.

With me I just can overcome vertical prisms of one diopter, or two, about the limit; then you can see it is a question of simple percentage.

If you have got a hundred dollars you can blow one. If you have got ten dollars, it is a little more risky. If you have got one dollar and blow the dollar, you are busted. [fol. 810] It is just a matter of per cent, really, and that is the way to look at it.

Q. Now then you have the correct interpupillary distance.

A. You get those measurements. You then have to get the bridge that will be—don't look at this, because my nose never ought to wear a bridge of this kind, but if I am going to be modern I have to do it. My lenses are always out a little too far, so don't take me as an example of a perfect fit, because it is not, but I will still stay modern.

The nose width has to be fitted, and you can see the nature of the nose I have got, and it takes an expert to fit my nose like a pair of glasses should be fitted to me.

Mr. Harkey: Counsel, could we add that the witness has a firm, resolute nose.

The Witness: As you see, the high bridge, and with eyes that are fairly well receded, as you can see.

Mr. Phillips:

Q. Yes, sir.

A. So I am no easy face to fit. As a matter of fact I never had from the best of them what I would call a perfect fit. [fol. 811] Q. Yes, sir.

A. But to come back to it then, he has got to get that, the right width, and here, what we call the saddle bridge, down like that (indicating,) if you can see with the bridge.

If I had known I was going to show you, I would have brought an old pair along and showed you a perfect fit made by hand.

But we have got to have the bridge and pads and all those things adjusted so that they don't raise too many sore spots on my nose, to say the least, and too much abrasion.

And after he has got that, then he has got 22 or 20, or some number, which he finds, he has then got to put these in such a size as to bring these optical centers right.

Q. In such a size frame?

A. In such a size frame. Then when you go from here (indicating) to the center, or from here (indicating) to the center——

Q. You are pointing to the pads?

A. Yes, across the distance in here (indicating.)

Q. Between the center of the lenses?

A. Between the center, yes. But when he gets all through, then it must be such that they should come from here (in-
[fol. 812] dicating) to the center, or from here (indicating) to the center, and it would be the same.

Mr. Branton: When you say "from here to the center" you mean from the pad on one lens to the center of the other lens, is that correct?

The Witness: This (indicating.)

Mr. Branton: Must be equal.

The Witness: My eyes are equally displaced, but if they are not, then this may—this eye (indicating) may be further from my nose than this eye (indicating,) so therefore that will be an unequal distance.

If he tests it over-all, he gets then an over-all answer, but my nose doesn't have to be in the center of my face necessarily. Therefore this eye (indicating) we will say is further out, so he has to then get this center (indicating) and make this bridge so that this (indicating) is a greater distance than this (indicating,) so it becomes then a combination of all of the details.

Mr. Phillips:

Q. The adjustment of these centers, Doctor, is that a matter of craftsmanship?

A. Or mechanical skill or craftsmanship, yes, to an extent I would say that you know the principles, but it is a
[fol. 813] matter of skill.

Q. That is right.

A. Yes. It would be like a tailor making a suit of clothes. You are not the same dimension here (indicating) that you are here (indicating.)

Q. You are indicating one shoulder (indicating)?

A. From here to here (indicating.) None of us are. One half my face is bigger than the other, I don't know which, but if you photograph it you find we are all handsome because we are not symmetrical.

Q. Now, Doctor, in the instance which you showed in which one of the lenses is tilted, how would the optician

recognize that fact in fitting that frame or that pair of eye glasses to the face? How would he recognize that one of the frames was tilted so that the vision of the doctor's patient had been obscured?

A. In the manner of which we spoke. If he had been trained in the theory of lenses he would then know for instance that if you take one diopter lens and you tilt it fifteen degrees, that he would get one tenth, about one tenth of a diopter cylinder along the axis of rotation, which would [fol. 814] be 180 degrees. That is, you can mathematically figure all those things for any degrees and strengths of lenses you please.

So he would know then that if it was a quarter diopter cylinder it wouldn't make much difference. It is the penny business here probably, but he would still adjust.

But if the lenses were higher, or had cylinders at the oblique axis, or he had more and more complications, he then would need to be concerned about the accuracy of the placement.

Q. I see.

A. And therefore if, as I said to you, if I only knew enough to tell the doctor, or I knew enough to tell the optician exactly what it was that disturbed me, fine, but you see sometimes this has been asked, and nobody knows what the angle was, or how powerful, nothing of the particulars, nothing of how he had used these lenses in the testing, so then the man who has been trained in the theory and the practice, that knows all the possibilities that could enter into this problem, that is his training.

Q. Yes.

[fol. 815] A. Like any diagnosis of anything. What are the symptoms? What are the complaints? They are likely to arise from what sources?

Q. Now, Doctor, in the event that the optician had unwittingly or unintentionally made an error so that the lens, the high powered lens was tilted slightly, would the patient know it?

A. Some of them wouldn't know anything about it, and some would know right off and say this, "I can't see as well as I could when I was in the office."

Now you don't know how much of a general complaint

that is either. You can put all the laughter in there that you want to on that. It just depends on how critical a person you get. You get me, and I am right there, and if those pictures are tilted a little bit,—and they are,—why I am going over there and straighten them up, but some other fellow isn't disturbed by the thing at all.

Q. The effect however would be that the picture was tilted in the patient's perception?

A. It may and may not be. I can't say.

Q. Would it be that the picture might be blurred?

A. It depends on the power and the axis, yes, and that you have to judge, I think, in all of this, as a combination of [fol. 816] a series of things which somebody has to test.

He then has done his best to carry out a very good mechanical adjustment, P D's, temples, and the right sized lenses and so they don't rub the ears,—those pieces back here (indicating,)—and all of that.

Then the patient goes back to the doctor, whoever that doctor may have been, who should then check and see that these are correctly made, with the lensometer we will say, and then if there is any complaint the doctor is the man who is presumed to know the nature of that complaint and its possible significance; so the constant trouble, I will say it that way, the difficulties in all of this are that somebody says, "Well I don't like these glasses."

The optician says, "I have done everything I know to make them right. I have checked the centers." He doesn't tell the patient that, but he has. "I have checked the powers, I have checked the angle." He has changed it a little, and has changed this a little, he can do that, and he has got those adjusted so I am not seeing double and so on. He has [fol. 817] done the best that he can as far as he knows.

Q. At that stage he has exhausted his skills?

A. At the moment, his skills.

And then, if there is further trouble, he says, "I think you had better go back and see your doctor," because obviously that is what he needs to do, because this very bill that we are discussing says that the prescriber shall be the ultimate—leave that out.

Mr. Phillips: Strike the comment with respect to that.

The Witness: I won't say anything about this bill, but

I will say this as a general statement, that the man who prescribes has to assume the final responsibility on the satisfaction of the material and everything concerned. He is the ultimate judge.

Mr. Phillips:

Q. In fact is it your opinion that that is true in all fields?

A. Has to be.

Q. Of visual care?

A. Has to be.

Q. Would it be true for example in the case of a physician who prescribed a hearing aid?

[fol. 818] A. It should be, but you know that it isn't so.

Q. Would it be true in the case of a physician who prescribed a false limb?

A. Yes.

Q. Or some other——

A. Well of course a man couldn't go out and just pick them up and try them out on somebody.

You take the field of hearing. You see, you asked me and I said that it should be but it isn't, because you can buy a hearing aid and if you don't like it you can throw it away and get another, but a limb, you have to have a measurement and an adjustment, just the same as this involves a measurement and an adjustment, so it is a little different.

Q. Would it be true with respect to the foot doctor who prescribes, who suggests a certain type of shoe?

A. Yes. That is the orthopedic surgeon.

Q. Yes, sir.

A. Or the podiatrist, or whatever you want to call him, foot doctor, or orthopedic surgeon. If you have an abnormality he would then have a shoe built in a certain fashion to support the arch or to raise the heel. Just a simple raising of the heel has straightened up many a hip, as you [fol. 819] probably can well guess, and eliminated many a pain. Yes.

Q. It is your opinion then that the physician in treating ailments of this character—ailments might be a technical word.

A. That is all right, let it go.

Q. ——ailments of this character is responsible for see-

ing that all measures are taken which will produce to the best of his ability the appropriate degree of relief?

A. I will say this, that he needs to know about everything that—if he is a skilled man and is desirous of doing everything he can for the interest of his patient—he should be able to be satisfied that either he or all those who have been associated with him in any manner have done all of the things which should be done.

Q. Now, Doctor, originally you were testifying with respect to the development of the field and of the education of opticians.

A. That is right.

Q. These services which you have been describing are those services which are within the field within which opticians are being educated?

[fol. 820] A. All these things that I have been talking about.

Q. Yes, sir, all these things that we have been discussing.

A. And a whole lot more, yes.

Q. And a lot more?

A. Yes.

Q. Would you explain——

A. If you want me to I will send you down my own book; I will have Russell Stimson send you his book; I will send these documents to any and all of you if you would like to see what is in them.

Q. To which of those books are you referring, sir?

A. The one on ophthalmic optics that has to do with spheres, cylinders, prisms, decentration, bifocals, trifocals, contact lenses, unequal image sizes, the whole field of these mechanical accessories or appurtenances toward enabling us to have better vision, no matter what the errors may be.

Q. In your opinion are all of the functions which are described in your book ophthalmic ——

A. Ophthalmic Optics.

Q. ——Ophthalmic Optics, the functions of a properly trained optician?

A. Yes. No matter—you may not want this statement [fol. 821] in.

Q. Yes, sir.

A. Irrespective of whether he is an optician or an optometrist, he should, and it would do no harm and would be very good if more ophthalmologists had more knowledge also.

Q. You commented that it would do no harm if ophthalmologists knew more of these functions. Do ophthalmologists receive training in the kind of services or skills which you have just been describing?

A. To a limited extent, yes. You may not want this in.

Q. Yes, sir, please keep it in.

A. They should have it, and I teach it to them in Tulane. For instance I shall tell you what I do myself all I can so that they know these principles, just as well as any optometrist and as well as any optician. I then take them to the wholesale houses where lenses are ground and made, and they get the experience there. Then take them where they are adjusted. You have the clinics in which these prescriptions are taken care of, and they see about the adjustment with the optician who does the adjusting. They study these topics.

[fol. 822] And why? First you can't be the boss and the master unless you do know it, and if you are going to be the supreme man you must know the details of all these matters, as well as in the great big things which are more outstanding.

Second, if he isn't going to be able for any reason to get his services rendered to him, or he lives in a community in which it is economically impossible for some optician to maintain such things separately, he probably will have to do it himself. So younger men today are beginning to think of it from those several angles; one, knowledge, and the other, self-protection.

Q. Is it your opinion however that in the present degree of training an ophthalmologist is not as adequately trained in this field, the average ophthalmologist is not as adequately trained in these services as a competent optician?

A. I think that is probably true, for the reason that his interest isn't in it. He is dependent upon and he wants to depend upon the skill of a man trained in that field that he doesn't desire to be thoroughly trained in and to practice.

The optometrist has the same interest, because he is [fol. 823] filling a prescription.

This man (indicating) is interested in refraction, diseases, treatment, diagnosis and operations, so he wouldn't be as concerned and skilled.

Q. Could you state an opinion with respect to the state of education and training of the ordinary optometrist as compared to a competent optician in the skills of which you speak under today's system?

A. Yes. It is going to be a sort of a—this is just a comment in passing, not to be put in. If I say this before I answer it, you will understand why.

The whole drive in optometry is to go toward professionalism, so if that is true, then less emphasis is being placed on the mechanical, so that the criticism is now brought against the teacher and professor in the schools of optometry that they don't teach sufficient mechanical and ophthalmic optics, and they belittle it. It is a legitimate objection and criticism.

Their fathers paid a great deal of attention to it. They begin to feel it is beneath their dignity, and that they won't do any more of that than does the ophthalmologist. [fol. 824] So therefore the stresses that were placed on mechanical optics perhaps commenced to be supplanted with more and more anatomy, and more physiology of the eye and more pathology, you see, and therefore you have got less time to do this. (Mechanical optics.)

Q. Yes, sir.

A. But over here then comes the man who had less of it because he hadn't any place to go, because if he goes to an optometry school he goes to be an optometrist, so he hadn't the opportunity of education, except as he got it under some dispensing optician, or he got it in some prescription laboratory, but now he has got the opportunity, not as good himself as his son——

Q. Yes?

A. ——or the optician does, or other men's sons, coming into this field to get the adequate training; so there is a tendency towards professionalism, for optometry is attempting to become, and is becoming more and more professional.

That means they are pulling away more and more from the mechanical, which is the right direction for them to go—according to me, that is; they won't all agree with

that—and that this man then, with the education pro-
[fol. 825] vided, is coming up, and he then becomes skilled, so that you have got now a very fine family.

You have got the man skilled in all these things, you have got the man skilled in accommodation and convergence and acuity and those things, and the other physical conditions and supervision.

Q. The first man, the man skilled in all these things, gesturing to your eye glasses——

A. That is right.

Q. ——by that you meant——

A. An optician.

Q. Yes?

A. We go back then, in the order of the optician first. He is then being trained into becoming more and more skilled in those things that are concerned with the mechanics and the optics of the visual appliances. They will overlap, as obviously is true.

This man (indicating) is becoming more concerned with the matters of vision, when it is not pathology, because pathology then he passes always up here (indicating). So he is concerned with matters of clear seeing.

[fol. 826] Q. This is the optometrist now——

A. Yes.

Q. ——of whom you are speaking?

A. Yes, and of course also the ophthalmologist, but we are confining him in his range of action. The optometrist as a professional man is more and more concerned with the getting of the data on the various visual functions such as ability to see clearly, the ability to convergency singly so he doesn't see double because of certain things, the ability to read the newspaper and so forth.

Q. Yes, sir.

A. And all of the things that have to do with vision as a process of seeing.

Q. Yes, sir.

A. Now that is what he is concerned about. Therefore he is concerned as a professional man with the thing, the prescription that he writes, plus one, 1.25 as combined with +1.75 cylinder, axis 45, combined with a one quarter prism—now we will say that is an illustration of what he is concerned with.

Mr. Harkey: Give that prescription again.

The Witness: One and a quarter (+1.25), or whatever [fol. 827] it is, sphere, (D S we usually write it) combined with +1.75 cylinder, that is 1.75 cyl. I put the axis—what did I say? 45? Because that is a possible optical axis of the cylinder.

Mr. Harkey: One degree prism base (in, out, etc.).

The Witness: That is one eye. Maybe it is the same for the other eye, maybe it isn't. Now that is a prescription.

Now when he leaves, then he is done with that, that is the optometrist is done with that prescription.

If he proceeds to become the optician he has to then do the things which a trained optician has to do, so he is an optician at that time.

By Mr. Phillips:

Q. I see.

A. And he is then concerned with the mechanics of putting this pair of glasses together.

Q. Would the development of optometry more toward the professional as you have testified, taking into consideration this field of interest of the ophthalmologist, would it be your opinion that it is becoming more and more important to develop a well trained competent group of opticians as a separate field in this country?

[fol. 828] A. Yes, I do.

Q. Is that the opinion of the leaders in the profession of opticianry?

A. In opticianry?

Q. Yes, sir.

A. Yes, in opticianry.

Q. Is that the opinion of the leaders in the profession of ophthalmology?

A. I would say yes.

Q. Is that the opinion of the leaders in the profession of optometry?

A. That is the question. You have asked me, and I will turn around and ask you, is it or isn't it?

Don't put that in the record. I will say it is not unanimous; it is divided.

No matter who does it, they know it is important, so that this man, as you asked me, this man, yes. It is a question who is going to do it. You see what I mean on that answer?

Q. I am not so sure that I see what you mean, sir.

A. Well——

Q. Will you amplify your statement?

A. They all believe in it, but the question is who is [fol. 829] going to do it.

Q. I see.

A. It is a matter of economics. If you want me to go further and say of my own knowledge that I know that, the American Optometric Association officially as a national organization went on record as saying, and you can find this in print, that they were desirous of being more and more professional because they were a profession.

Finally it has been accepted that they are. It was a long argument as to whether they were or not; but generally accepted. Number 1.

Number 2, that they did not propose to fill nor want their optometrists to fill the prescriptions of ophthalmologists. They can fill their own if they want to, but they were not a medium of filling.

And then this, I will tell you. I saw Dr. Jim Wahl last night, and this was the remark, "We are in favor of opticianry." So they have said so officially, that they were in favor of the right type of opticians.

Q. Well, you indicate that you have reservations with respect to such statement, sir, from your knowledge?

[fol. 830] A. Well that is a good question. Now can I answer it right and fairly? As far as I know myself they are to this moment holding to that thesis as a national body. Jim Wahl reaffirmed it; the president Wahl reaffirmed it to me last night.

Q. Now, sir, what steps are being taken in opticianry, if you know, to improve the training and education of their members to meet the situation which you describe?

A. Just a minute. I want to ask you what situation it is that I described?

Q. The situation that I meant, sir, is your testimony that there is a growing tendency to place more and more re

sponsibility in the optician to perform the kind of services you mentioned.

Mr. Harkey: I object. He didn't testify to responsibility. He testified that there was an effort to educate.

The Witness: Yes.

Mr. Harkey: But I believe the witness has made it clear throughout his testimony that the responsibility lies with the prescriber of the lenses, and must lie with him.

[fol. 831] Mr. Phillips: Yes. The word responsibility may be erroneous.

The Witness: You see that is why I was hesitating.

Mr. Phillips: Yes, sir.

The Witness: I must answer you the question and say that there are now three courses in the United States, first in 1946 at Rochester, Minnesota, the second under the University of the State of New York, the so-called Institute of Applied Optics—I don't mean applied optics; Applied Science, in Buffalo, New York, the third in the Los Angeles City College, have been created since that first one in 1946, with two-year courses, for the purpose of training adequately prepared, basically prepared—because you must get your experience after college, you know.

By Mr. Phillips:

Q. You testified, sir, that you were a professor or instructor in one of these schools?

A. Yes.

Q. Which one, sir?

A. Rochester, Minnesota.

Q. Have you with you a curriculum of opticianry offered by that school?

[fol. 832] A. I have. I would have to go to my room to get it.

Q. Will you furnish such a curriculum to the court reporter?

Mr. Harkey: If the witness can quote it approximately from memory I think that would be adequate.

Mr. Phillips: I think we would like to have an accurate curriculum of the school if you don't mind, Mr. Harkey.

Q. You need not do it right now, sir.

A. I will send you all, if you want—give me your names and addresses and I will send you articles I have written on it, the Guild, Opticianry Guild of Prescription Opticians, I will send you the college catalogues; I will send you at least a small volume to get the essence of it. I can say what it consists of essentially.

Q. Then will you state the essence?

A. Would you like that?

Q. Yes, sir.

A. It is two years. You come out with a certificate in opticianry, which you would expect, but they also grant at Junior College a degree of Associate in Arts if they attain a certain scholastic standing. That is the practice. That is the Junior College practice.

[fol. 833] The curriculum, the first year consists of such materials as are basic to any man who is in anywise engaged in anything of an engineering character.

Now I don't call this engineering, but it is—it isn't optical engineering, no, but it is below that grade, but involves the ability to handle mathematics and formulas and so on.

So your first year consists of solid courses in physics, it consists of a solid course in mathematics, algebra, trigonometry and a little of calculus.

It consists of courses in English, because you have got to have it. Even though the students don't want to take it, you have got to have it.

And there is one thing, you have the electives. In general you get psychology, you get economics; this being the thesis, that if he changes his mind he still has got a year of college work, whether it is pre-medical or pre-dental or pre-engineering and so forth.

Somebody else changes his mind and wants to come in. They have got pretty much of the first year.

[fol. 834] There is one course in optics in the first year of three hours credit in which he learns the grinding of glass, learns to block, begins to put some curves on. It is the introduction in the rough work in the manufacture of something that concerns opticianry.

The second year is practically wholly optics. He has then my course of six credit hours and he comes to me twelve hours to fifteen hours every week, and he goes then into the

mechanical optics, and he has six hours a week, and he then comes into one hour credit course, in which you go over something about an eye, how it is made up, what coats and so on, and the rods and the cones and so on, and a little of physiology and something about hyperopia, what it means, and myopia, so he can talk the language with the doctor, and then you continue on about the instruments that these men use, so that he will be acquainted with what they do, roughly.

And then he has some elective courses, so you put it solid on the foundation that it should be.

In addition he has a course, one semester, of some general biology, and he has a course in anatomy [fol. 835] and physiology of the body of a type that nurses would take.

Q. I see.

A. That is, he would know something about the body. Two principles, one, that he should know something as a matter of general background; second, that he should know specifically a good deal about the thing into which he is going.

Q. Do you not recommend to your students who are graduating from this course an apprenticeship?

A. Yes, we recommend it. In fact that school guarantees that everyone who graduates will have a job.

Q. Will you explain the importance of the apprenticeship?

A. Yes. The importance of the apprenticeship is this; he has endeavored to train his brain to do some thinking that he can't get anywhere else than he gets in the four walls of an institution.

We have trained his fingers, to become somewhat skilled, and to coordinate his brain with his fingers, but when he is out he must have, the same as any other man, practice to gain experience.

[fol. 836] He then needs it under some man who says—You may not want to put this in.

Q. Yes, I am sure we do.

A. "Kid, you are swell, you went to school, but there are

a lot of things that you don't know, that you will get from experience." And we know that that is only too true.

The only thing you can do for him in school is to found him on the fundamental principles.

Q. Yes, sir. Now then will you explain—Doctor, you stated that you were a member of the Board of Opticianry. You are president of the Board of Opticianry?

A. I was the first president, for three years.

Q. And now secretary?

A. I will give you the whole history. I was president for three years, that is all. If I hadn't been, there wouldn't have been any board. Don't put that in, but there wouldn't have been, because I was the only man that they believed had no axe to grind, that is how it is, because I wasn't making my living from any of it.

Q. Will you explain the function——

A. Then I was chairman of the Executive Committee, [fol. 837] then I became secretary.

Q. Will you explain the function of the Board of Opticianry?

A. Yes. And I will send you those documents and the brochures. They are here on the floor below.

Q. If you will just describe it to us roughly, sir.

A. The brochures concern the history and development of opticianry in which we give a little of the antecedents of who are the early folks in this field, and the development.

Q. Will you furnish one to the court reporter——

A. I will.

Q. ——for attaching to your deposition?

A. Yes, I will. And if you will make a list or send me a list of all these things, I will not only send you that, but I will send you anything more that I think might be of use.

Now let's go back to the board. Its functions were strictly of two characters. One was to support education in schools and see that they were established with adequate faculties and adequate curriculi. That is obvious.

The second was to examine graduates, not only the school examining, but they should then be examined [fol. 838] and certificated by the board so that they would then have a certificate issued to them. That brochure car-

ries the wording of these certificates, that they had completed this two-year course, et cetera.

Q. Is such a certificate similar to the certificate which is awarded a fellow of the Academy of Ophthalmology?

A. No. In a way. I will say in a way it has the same thesis, the same idea back of it, that it is by examination much more rigid in the case of ophthalmology, to be sure, but the idea is essentially that, that you examine and certificate men who have had previous training; so I will say yes, by all means, except not quite comparable.

Q. Not comparable in degree, but comparable in purpose?

A. In purpose.

Q. Is that it?

A. Exactly the same.

Q. I see.

A. Yes.

Q. Will you state whether you have been involved in any way in the promotion of legislation respecting the profession of opticianry?

[fol. 839] A. Had absolutely nothing to do with it. The board was not created for the purpose of legislation. I have felt that the board should have been a little more concerned about the matter of legislation, but it was set up to be concerned with education, certification by examination only, and that these other functions such as legislation should be carried out by all of the opticians, rather than a function of this board.

Q. Does the board approve the principle of an optician licensing law?

A. Yes.

Q. Officially?

A. Yes. I am sure that they would like to have the right types of laws, adequate laws creating the right kind of opticianry boards with requirements that specified in the laws the amount of training, the years, and the acceptance of schools certified by the board, for instance, as a proper standard, with such other measures as should go in there on the basis of what we might call exemption, because you have got to have something of that type in there, and then those that have been in a few years and cannot go to school [fol. 840] because they are too old but here you will assist

them with night courses and with special instruction; take the examinations of the board, plus their credits that they might get from a junior college or from an institution or college wherever that might be, and then pass those boards; there might be a few who could do that.

Q. Does the board approve the further extension in other colleges and universities of the establishment of opticianry schools such as you have described in your college, in Los Angeles and others?

A. Yes, they do, with this proviso, that these that we have got are made tops and are well supported before you start in to have some more.

Q. Do you know whether——

A. In other words if you have got two children or three children, you better take care of them before you get a dozen more of them.

Q. Do you know whether or not it is the official position of the board that such schools and such licensing laws are the proper solution of any public ills which may adhere in the present status of opticianry?

A. We are all convinced that proper training, plus a [fol. 841] protection to the one who is properly trained, would then not only protect him but it would protect the public, so everybody benefits by such adequate laws, and therefore we would all believe it would be good.

Mr. Phillips: Let's give our court reporter a recess for a few minutes.

(Whereupon a recess was taken.)

By Mr. Phillips:

Q. Doctor, you testified at length respecting the skilled services performed by opticianry?

A. Yes, whether it be performed by an optometrist, ophthalmologist or an optician, the skilled services that should be rendered, that is right.

Q. Does the optician have a merchandising function in the proper scope of his activities?

A. Yes. I don't think you could say no. You would have to say yes, because he is handling material things, and he isn't handling any professional things. In that sense

of the word he is a semi-professional artisan, is the best way I can explain it.

Q. In your judgment is that an essential part of his activities?

A. Before I answer let me ask just this question——

[fol. 842] Q. Do you want me to clarify my question?

A. You mean should he be interested in style?

Q. Yes, sir.

A. And all those things. Certainly. He should be. He should be expert in all the things that are for utility and that are fittest as a part of ourselves, and make us look the best we can be made to look, let's say.

Q. In your opinion is it meritorious for an optician to provide a sufficient selection of merchandise that the patients who are referred to him may be satisfied with what they find in his premises?

A. Well it may graduate all the way from the prescriber specifying, if he cares to, as to the type of frame, or he may then find the general desire of the person who has come to him to have rimless or brow-line, (just to use somewhat modern words) like you have (indicating,) brow line, to classify them, or tinted, or what not.

Yes, I think that one would say that he needs to have a reasonable number of these as an exhibit to indicate what the possibilities are in that field; in range, that is.

Q. In your opinion——

[fol. 843] A. Just the same as if you want some shoes or some suits of clothes, you have to give them some idea, yes, and then he will put them on and his wife says, "That is good," or she looks and says, "No, I don't like that."

Well they are not concerned with the real vital part of this prescription at all. They are concerned with the artistry of it.

Q. Is it your opinion then that an optician is properly concerned with the cosmetic features of the eye glasses or frames?

A. Yes, should be. Should be concerned with it.

Q. In your opinion, sir, is that part of his function a function which in the interest of public health and welfare is better performed by opticianry than by an ophthalmologist?

A. I don't think it is in the interest of the public health whether he has a pink spectacle or an up to date one or not. The thing that is in the interest of his efficiency and his own personal health perchance, (although that is questionable, in some cases) is the prescription and the lens. They are the essential thing.

Q. I see.

[fol. 844] A. And that the frame hold them in the right positions to afford the things which they should give optically.

Now whether the ophthalmologist or the optometrist or the optician does it is nobody's concern as long as it is well done.

Q. Do you know what views the leaders in the profession of ophthalmology take with respect to the furnishing of the kind or selection of frames which is ordinarily made available by an optician?

A. Well it runs the whole gamut of those that positively pay no attention to it, to those that pay a great deal of attention. You see it just depends upon the individual practitioner, really.

If the ophthalmologist sent the optician, or the strictly professional optometrist—and there are quite a number who are sending their prescriptions—if he sends it to the expert over here with a feeling that that expert will do all the things that will satisfy that patient, from the standpoint of the correctness of the prescription, the filling of it, and from the standpoint of the cosmetic and personal satisfaction of the eye wearer.

Q. Will you state whether or not it is the customary [fol. 845] practice of ophthalmologists to issue prescriptions for lenses to their patients, which may be filled at opticians of the patient's choosing?

A. Again that varies. Some do and some don't.

Of course a great deal of it is probably done on a referral to certain individuals who satisfy the ophthalmologist that they are capable of doing this work.

Now you begin to—now everybody in this room knows now that all of this is dynamite, because you just bring up this whole problem of what is he doing in rebating, and

all that, you see what I mean, so you have got all of that in the background when you ask me that question.

Q. I wasn't intending to elicit that.

A. I know you weren't, but I wished to be sure. He may issue it directly to some concern. He may say, the patient may say—or you may say, "Is there any optician with whom you are acquainted where you would like to have this prescription filled?" He might do that, or he may say——

Q. If I understand your statement correctly, that would be in the nature of a recommendation.

A. Yes. It can vary all the way from "Here it is, and [fol. 846] then go out and do as you please, but you come back because I am going to check to see it is right," to a prescription only directed to one person or one group.

It has the gamut of possibilities. It probably depends upon the size of the city, the size of the town, what he can get and what he can't; who is there.

Q. Would it or would it not be true however, sir, that even in the presence of a recommendation the patient would be entitled, with the prescription, to take it to an optician of his choosing?

A. I would say he would, but you would have a very large number of men who would claim that that prescription was their property.

Q. A large number of ophthalmologists you mean, sir?

A. Well, some. Many. I presume I can say that the optometrists claim, almost universally claim that that prescription is theirs.

Q. Well I was intending to exclude optometrists from my question, sir.

A. Yes, sir.

Q. I was directing it strictly to ophthalmologists.

A. Ophthalmologists. Well those practices vary enor- [fol. 847] mously in the degree in which the prescription is considered to be the individual's property or not.

I would say that it is. A prescription that the doctor gave me for a certain compound to the pharmacy is my property; he gave it to me. He is only concerned that I go, and I have to go to a registered pharmacist, so therefore that is taken care of and his interest then ceases.

But on the other hand the practices are varied on down

the line, so that some men still would say that I am sending you down to so and so, and some would say that this is your prescription and would recommend some men who might handle it, or give them a copy of it, so that if anything happens—well it can vary all the way along the line, as you might well guess.

Mr. Phillips: That is all the questions I have.

Cross-examination.

By Mr. Harkey:

Q. Dr. Sheard, I believe you testified that one of the things that you were trying to do as you had influence in the field of optics was to get the examiners out of the [fol. 848] jewelry stores and get them on a professional basis, is that correct, sir?

A. No, I didn't say it quite in that fashion. I said that optometry had started with opticianry in the jewelry stores quite a bit, and has grown out from it as the element——

Q. You think that is a good trend, that they want to get out of the jewelry stores?

A. Why yes.

Q. And drug stores?

A. Yes.

Q. And department stores?

A. I do.

Q. Now you gave as an example a lens prescription for one eye, a plus 2 diopter sphere, 1.75 cylinder——

A. Axis 45.

Q. ——axis 45, with a one degree base in. That would be a reasonable, ordinary prescription for a person, we will say with astigmatism, would it not, sir?

A. It would be not the ordinary amount of astigmatism, nor would prisms commonly be incorporated.

Q. No?

A. Because it is a little high for the ordinary amount.

[fol. 849] Q. That is an abnormal or rare lens in that type of prescription, in that range?

A. It is rather uncommon to this extent, that most of your prescriptions, either single or compound—these spheres or cylinders are compounds. They are not apt to run as high as 1.75 cylinder. They might run .50 to 1.00. That is much more common. I put it in and emphasized it for the reason that the higher the degree of error, the greater care and precision there has to be.

Q. Now if a person had a pair of glasses with that prescription in one eye, and that person had we will say an ear that was higher than the opposite ear, markedly so so that the frames were twisted, and we will say that he had one of these exotic tear drop shape lenses like we do have these days, how easy or difficult would it be to analyze and get that prescription accurately by checking this lens in a lensometer?

A. Well he still could take it and put it in the lensometer, determine the optical center, and he could then determine the axis, because they are marked.

Q. Can he put that axis——

[fol. 850] A. That little scratch, that little indicator where the horizontal is, you see what I mean, there is an indicator of that, and then when he has it in he can measure that, irrespective of what shape it may be, he still can tell, when it goes across this way (indicating,) you see.

Q. Yes?

A. Whether it is axis 180 or 145.

Q. With that one degree base in prism would the optical center of that lens properly be mounted outside the center of the eye?

A. Well whenever you put a prism in or out or up or down you of course then shift that optical center from the original straightaway position to throw the beam of light to the right or the left or up or down.

Q. In other words would that be a case in which that lens if broken should be duplicated without a re-examination or without checking the prescription accurately?

A. Whether it should be without re-examination is a question that I would have to pass, because if I would express the opinion it would depend upon how recent, how many months or years have gone by; but on the duplication

[fol. 851] of it I would say this, that the prescription ought to be had in such a case as that.

Q. Should have a prescription?

A. Then there is no possibility of an argument. Somebody has got to have the prescription available to be dead sure.

Q. Doctor——

A. Now he can do pretty well without it.

Q. If a student has finished that two-year course at say Rochester, Minnesota, in that course he would have study of the use of the lensometer, would he not, sir?

A. Yes, sir.

Q. Would that student be qualified at the end of that course to attempt to duplicate we will say a two-degree prism in a lens and should be able to measure it?

A. He should be able to measure it without any argument.

Q. Now after how much training on the lensometer should that student be able to accurately check that prism?

A. Well now the——

[fol. 852] Q. An average student.

A. Yes.

Q. Of average intelligence.

A. I cannot answer you that question with any degree of certainty, and I will tell you why. That is an instrument that, like any other instrument, you have got a dial and you turn it until you get it in clear focus, then you get the axis, and you get the amount and you find the center, or you find the prismatic element. Therefore, he doesn't need to know all about the optics of the lens in order to be able to use the instrument.

Q. It is an instrument in which human skill still plays a part even though it is an instrument?

A. That is right. He has to learn how to do that well.

Q. Can he learn that in fifteen minutes training?

A. No, no.

Q. Would it be more the result of say at the end of a 15 semester hour course in mechanical optics?

A. Well it is obvious that the more he does of that the more accurate he will be in every part of the performance, just the same as with the situation of anything that in-

volves skill and the determination of the elements involved. [fols. 853-854] —— data is right there. You take and adjust it this way (indicating.) I could show you and do it and so on, and yet the boss in that dispensing setup, or the boss in the branch office can do a better job than I can, because he is doing it all along.

Q. Doing it all the time?

A. Yes.

Q. Now, Doctor, is it your opinion that we would probably have better visual care if we would take the commercial angle out of the dispensing of optical supplies and put them on a purely professional basis?

A. Just what do you mean by commercial?

Q. Well, the bait advertising, luring people in.

A. Oh of course I would be absolutely against anything of that kind.

Q. Just against any advertising of that kind?

A. Any advertising of any kind.

Mr. Brantom: Any form of bait advertising I believe is what the doctor said.

The Witness: I don't claim to be an expert on matters of advertising, but I am saying to you that I would be opposed to any kind of advertising that would be, as we call, misleading advertising, but which the public wouldn't know is misleading.

[fol. 855] That is all I could say. I couldn't say that I am opposed to all kinds of legitimate advertising.

I think that a professional man can't advertise. How much a real skilled mechanic such as an optician can advertise is a moot question.

By Mr. Harkey:

Q. Is decentration rather important in placement of lens in a frame?

A. Well if you decenter it means you introduce a prismatic element, yes.

Q. That can be serious if it is carelessly done?

A. It can be if the prescription is a rather strong one:— well again, it is the power of the lens, and if you happen to decenter in the wrong direction——

Mr. Harkey: That is all.

Mr. Daugherty: Doctor, may I ask you a few questions, please, sir?

The Witness: Yes, sir.

Cross-examination.

By Mr. Daugherty:

Q. Among your many activities I would like to kind of get straight a little bit about your professional qualifications. You are a Ph.D., I believe?

[fol. 856] A. Yes, sir, as well as a Doctor of Science, Sc.D.

Q. Are you an M.D.?

A. No, sir.

Q. Are you an ophthalmologist?

A. No, sir.

Q. Then you don't of course belong to the American Medical Association?

A. No, sir.

Q. Now you are at present the secretary of the Board of Opticianry?

A. Yes, sir.

Q. And you have been president?

A. Yes, I was president for the first three years.

Q. Of that organization?

A. The chairman of the committee, then became the secretary, that is right.

Q. Now are you an optometrist?

A. Yes, sir.

Q. You hold a degree of optometry?

A. I built the schools. I created the degrees. There weren't any, so I am the father of the creation of a degree, and I hold only one. That is an honorary degree of Doctor of Ocular Science.

Q. I see.

[fol. 857] A. From the Los Angeles College.

Q. Are you licensed to practice optometry in some of the states?

A. I am licensed to practice in the District of Columbia. Have been for many years.

Q. Have you ever practiced optometry, Doctor?

A. Oh yes. I started the school and the college, ran the clinics at Ohio State University in the years I was there, from 1914 to—let's see, 1914 was when the course went in, and I think it was 1919 when I left.

Q. Have you practiced optometry as a practitioner since 1919?

A. No, I haven't practiced it, but I practiced ophthalmology with the ophthalmologists, and I have practiced optometry with the optometrists, and I have practiced opticianry with the opticians, if you understand what I mean. I have been a free lance on the basis of what I could contribute by reason of my knowledge.

Q. Well by practicing I mean coming in direct contact with the public.

A. In an office in which then I have had a public that has come to me? No, sir.

[fol. 858] Q. That is what I mean by practice.

A. No.

Q. I mean undertaking the professional relationships.

A. If I am down to Tulane, there will be the clinics there.

Q. Yes?

A. I will go in and serve an afternoon if I like, see what the boys are doing, check them, go back and get other data, and check on this and on that, so to that extent, yes, and to that extent, no.

Q. I am merely trying to find out——

A. Yes.

Q. ——just what your qualifications are on this subject, and as I gather it you are not a licensed ophthalmologist.

A. No, sir, and I wouldn't care if I were not a licensed optometrist or a licensed optician.

Q. Yes?

A. Because fundamentally I am a man interested in visual science, as an educator and a research worker.

Q. Well your principal qualification I guess then would be in the field of biophysics?

A. That is a general field. It covers physiological optics as a part. The thing for which I am noted the world over, [fol. 859] supposedly, is the broad field of physiological

optics, which has all to do with the fundamentals of things of vision.

Obviously I must be able to practice those things which I teach, and which I established and built, because it would be nonsense then if I couldn't do those things.

Q. I suppose you agree with the proposition that a person's eyesight is a rather precious thing?

A. I should say that of the five senses it stands at the top.

Q. I further take it that treatment of defective vision or disorders of the eyes should be treated and handled professionally?

A. Yes, sir.

Q. Do you recognize and agree with the fact that glasses, unless properly adapted, may seriously aggravate a condition and bring about nervous and physical disorders and discomfort and loss of efficiency?

A. I am laughing. It is surprising how much of that could be wrong and cause none of it, and it is surprising how little of it could happen and aggravate. Yes, it is possible.

[fol. 860] Q. You recognize that loss of efficiency can take place through improperly adapted glasses?

A. Well I will take my own case as an illustration. I will take off my glasses. I am not blind by any means, and I will never go blind for the lack of a pair of glasses. I see you in a general haze over there, and I see him.

I can leave these and forget them, and I pick up the newspaper and I can't read the headlines, none of the biggest things, so I am inefficient, very inefficient.

Otherwise no danger, no damage. Nobody can prove anything that that is true or isn't true. Probably nothing has ever happened, whether a pair of glasses is on or off, as far as the real disturbance of the rods and cones and all of the functions of vision which lie within the eye, but I would [illegible] and if my eyes were

In my case it is a big error, and won't cause such trouble—because nature just won't overcome it. Just can't [fol. 861] be done.

Q. Doctor, in your opinion is there anyone qualified to make an eye examination for the correction of defective vision but an optometrist or an ophthalmologist?

A. Not by law.

Q. What law are you speaking of?

A. Either one, medical acts or the optometric acts. The medical acts put no limitations. The optometric laws are limited.

Q. In your opinion is that a good law in the interest of public health and good visual care?

A. Oh yes. Oh yes, certainly.

Q. Do you think unqualified persons ought to be permitted to visually correct the eyes of another?

A. No.

Q. Is that a good law in your opinion for the protection of the public?

A. Yes, sir. That is, in the last analysis I had always been led to believe that that was the purpose of the law, was to be for the protection of the public and its betterment, and so you would have to say that by far and large such regula- [fol. 862] tions as would force men to become educated, cause certain things to be done whether they want to or not, all of that would tend to give the public a better service in the intangible things, which are the things of a professional practice.

Q. Doctor, if a person has defective vision and needs eye glasses to correct it, should an optician be permitted to furnish those eye glasses, except pursuant to the written prescription of either an ophthalmologist or an optometrist?

A. Well he has got to get the information as to what should go in this lens somehow.

Now we will say that the surest way to get it is to have the prescription in his own file, or the ophthalmologist has

Q. Let me ask you this question, let's take a youngster who has never had any glasses, and he develops defective vision——

A. Yes.

[fol. 863] Q. ——and needs glasses, let's say, to correct this defective vision.

A. Yes, let's say he needs them.

Q. Should an optician be permitted to furnish glasses to that young man unless he has got a written prescription covering an eye examination made by either an optometrist or ophthalmologist?

A. Initially he could not. He has to have the first prescription, that is right, because he couldn't—he can't examine an eye.

Q. I believe you have already testified, Doctor, that the optometrist or the ophthalmologist remains fully responsible for the visual care of his patient once the professional relationship arises between them?

A. That is exactly what should be the responsibility. He is the only one in the last analysis who can.

Q. You believe in professionalism, do you not?

A. Yes, sir.

Q. Do you feel that the relationship that exists between a person needing glasses and his optometrist or ophthalmologist is a professional relationship and should be a professional relationship?

Mr. Branton: Excuse me. You mean lenses when you [fol. 864] say glasses, do you, sir?

Mr. Daugherty: Yes.

Mr. Branton: Yes, sir.

The Witness: Just say it again. Do I believe——

By Mr. Daugherty:

Q. ——that the relationship existing between someone coming to an optometrist or ophthalmologist for lenses to [illegible] vision if that relationship shouldn't be

and findings are fundamentally between first yourself and the patient, yes, that is where it has to be originally, so that as far as the findings, or telling the patient what he found, it is the direct function——

Q. My question is, is that relationship a professional confidential relationship?

A. Fundamentally I come in to have somebody——

Q. Existing between doctor and patient.

A. Yes, come in, and I am in visual trouble, I cannot see, or I say I have headaches, and so on, then it is a professional relationship, and it involves all the elements of such profes-[fol. 865] sional care and treatment, so it is the business and it is the affair between the doctor and the patient.

Q. You feel that that relationship should be professional then?

A. Yes.

Q. And should be confidential?

A. To the extent that in so far as his findings are concerned, he generally records his corrections there, and all the data he puts down on the record sheet, all his data in examinations, and what the ophthalmoscope shows, and the retinoscope shows, and this and that and that and that, that he keeps, except when he discusses it with other professional men by reason of such meetings as these, in which those data are taken as X, Y, Z, that is for illustrative purposes, yes, and those findings are put there and they are confidential in the sense that they are kept by that examiner.

Q. Do you think that an optometrist or an ophthalmologist ought to hire himself out to a commercial interest and be under their control for the purpose of making eye examinations and writing prescriptions?

A. No, I don't.

Q. Do you feel that such an arrangement is bad [fol. 866] for the public welfare, public health?

A. Yes, and I will tell you why, it can't leave the man unbiased and free to do that which he should do.

Q. In other words the commercial aspect overpowers the professional treatment or treatment of the patient?

Q. You feel that eyesight, as precious as it is, should be treated professionally?

A. Yes.

Q. And on a professional basis?

A. Right. I don't say that the man in corporate practice may not do a very good piece of work. You understand that I am not saying anything about what may occur. He may give a very fine service, but you have not the operation of the elements that permit you to feel that an unbiased judgment has been arrived at, and if you want me to put it that way, that you aren't just being sold specs as fast as you can be sold specs.

Q. You think that is bad for the public welfare, do you not, the public pocketbook and public vision?

[fol. 867] A. Well to this extent, yes, he has got something which either is semi-unsatisfactory or wholly unsatisfactory, and he has got the one great advantage with this pair of glasses, he can throw them off, and that is a great big advantage. The rest of it you can't throw away sometimes. In other words he cannot lose his fundamental eyesight;—not his accuracy of form, but the fact that he can see.

Q. Do you think that ophthalmologists or optometrists should receive rebates or kickbacks from opticians?

A. No, sir.

Q. Do you think that it is in the interest of public welfare and for the good of the public that such practices might be made unlawful in a given state?

A. I think that should be everywhere, yes.

Q. And wherever that is done and that is the law you feel that that is good for the public interest and the public health and public welfare?

A. Yes. Now if the man who wrote the prescription and gave it to me told me that "You go over here and they will do good work, and part of my fee will come from that work," and it had been so stated in the prescription laboratory that we charge those prices set by the doctors, [fol. 868] and they receive part of their compensation from

the statement to you that rebating is bad, because it can't be done and done honestly.

Q. You think that is a good law then, do you?

A. All laws that prevent rebating or splitting of fees.

Q. Well, Doctor, getting back to——

A. Because that cannot be done honestly.

Q. Yes?

A. If the patient knew that the consultation fee was so much, and so much went to him (indicating), and so much went to him (indicating), and therefore it is specifically stated, you would know why and what was done; but if it isn't, there is deception, and then you have rebating and a split fee.

Q. Doctor, getting back to your testimony that you gave a minute ago to the effect that ophthalmologists and optometrists should not hire themselves out to make eye examinations for a lay person or a lay group or a commercial inter-[fol. 869] est, do you feel that the public welfare is served and the public interest is served by any prohibition which prevents that type of commercial control or professionalism? I believe that is the end of my question.

A. I don't quite get it.

Mr. Daugherty: Read the question to him, please.

(Question read by the reporter.)

The Witness: Well obviously if it was prohibited, and therefore was presumed not to exist, it would have been deleted and there couldn't be any question about it.

By Mr. Daugherty:

Q. That is good for the public welfare and public interest then?

A. One would say that as soon as you keep professional men professional, and keep professionalism so there isn't any possibility of taint, you have prevented them from doing the other thing, and therefore one would say, if we can believe in education and we can believe in ethics and

commercial control over professional eye examination, by any type of subterfuge or any other kind of arrange-
[fol. 870] ment, is in your opinion for the public good?

A. Should be beneficial.

Q. You don't feel that people should violate the principles which you have just given to support this, by indirection, in other words by subterfuge?

A. Oh no, no.

Q. Any prohibition which prevents subterfuges from being in existence is therefore good for the public interest, I take it?

A. I think so. Certainly the public can't protect itself. The only manner in which it can be reasonably well protected is by law.

Q. That is a very good statement.

Mr. Daugherty: I believe that is all.

Mr. Phillips: Do you have any questions?

Mr. Harkin: No.

Mr. Phillips: I have just a very few questions.

Redirect examination:

By Mr. Phillips:

Q. Your testimony is that a badly adapted pair of glasses could produce loss of efficiency and nervousness?

A. Well I said that it could be an element that would enter in, and I said there are many of these that did
[fol. 871] not produce any of them.

Q. Could you make the same statement with respect to a badly fitted pair of shoes?

A. Certainly.

Q. Could you make——

A. That is, if you have got something which causes irritation and discomfort, yes.

Q. You also testified——

A. And yet I might not be disturbed with something that the next fellow would be disturbed about.

Q. That is right. You also stated that you knew of no

ever gone blind for the lack of a pair of glasses, because inherently it is the same as it would be with a camera. Suppose a camera is out of focus. The camera still isn't injured. The ability,—if you can put it right in focus and produce the image,—is just the same and is inherently there no matter what the adjustment might be.

In this situation with the eye, if it is well nourished, the blood supply is as it should be, and there is no evidence of disease, then the images may still be indistinct, like I say [fol. 872] mine are markedly so without glasses and none of us yet have ever been satisfied that you could say that blindness had been caused, because blindness is a great deal different than the ability to differentiate details.

I can't give you any details of those pictures, but I know there are some pictures, but I have about sixty per cent visual capacity, because I can go down on the street and I can go my way, I could even drive my automobile, and I have done it time and time again; I have not lost the ability to see at all, I am not blind, but I am very definitely incapacitated and made inefficient.

Q. If I understand your testimony correctly, is it that you are stating that the incapacity is not increased, but it is not aided by virtue of a badly fitted pair of glasses?

A. No, because I want to tell you, suppose we have a squint because the eye turns in toward the nose, and here is the one eye that sees very well (indicating), here (indicating) the vision is low but there is still vision there, and if you cover this eye (indicating) it will begin to function, and therefore you have to get the straightening of these eyes in getting them to work together you have to get [fol. 873] the disused eye to begin to exercise itself.

This arm (indicating) could be strapped here (indicating). It wouldn't be dead. No. Of course to illustrate it would have to be interpreted in the right manner, that it would have to be exercised to bring it back and be restored, you see what I mean by that, and yet relatively speaking at the time it would be very inefficient.

Q. You have been speaking in terms of blindness, sir.

A. That I was, because of the fact that there are so many statements made, well they are going blind, they are going blind. Well you aren't going blind. You are just seeing

Q. Is it your opinion that the essential services of the optician are such as to make the prescription of the ophthalmologist or the optometrist effective?

A. That is right.

Q. If he should make unwittingly an error is it your opinion that he would physically damage the eye?

A. No, I don't think he will, but he won't give the patient the service that he should have.

Q. That is right. I see. Now you testified, sir, that [fol. 874] you believe it is detrimental to the public health and welfare for a department store or a jewelry store to hire an optometrist or a professional man because of the commercial aspect which automatically becomes involved once the department store or other interest which is interested in profits is involved. Let me ask you, sir, is not that same commercial aspect involved in an optometrist's dispensing eye glasses?

A. Well he dispenses his own.

Q. I see.

A. He gives an all over, an inclusive service, so it is included as a part of his service. Anyone who does that might be accused by somebody of having a commercial interest in the procedure, because he would then be furnishing the glasses, and therefore the question of his integrity might enter, but he is the only one involved and it is his standards and his ethics, which are one thing; but when he hires himself out to somebody else and is under the control so that he has got to sell so many pair of glasses, we will say, in order to get his job and keep it——

Q. Is it however to eliminate the possibility of the [fol. 875] commercial aspect in the practice of optometry that the leaders, as you have testified, are turning to the view that optometry should be a strictly professional activity?

A. That is the only reason. That is, if you are going to be professional, you have got to come over and be professional.

Q. I see.

A. Right.

Q. So you testified that in your judgment a confidential relationship is established between the optometrist and a

patient or an ophthalmologist and a patient when the patient approaches that professional man to seek eye care.

Let me ask you, sir, in your opinion is it a violation of that professional and confidential relationship for the prescription to be issued which may be taken to a qualified optician?

A. No, I don't think it at all, any more than if he gives me a prescription to take to the pharmacist is it a violation. Presumably it is the very thing which should be done, because how in the world am I going to get it if somebody doesn't send me where I can get it.

[fol. 875a] Mr. Phillips: I have no further questions.

Mr. Daugherty: One question, Doctor.

The Witness: Yes.

Recross-examination.

By Mr. Daugherty:

Q. Isn't it true that when an optometrist makes an eye examination and dispenses his own glasses that he is doing exactly the same thing that the dentist does when he pulls a tooth and inserts a bridge?

A. Well presumably the dentist is doing a little more than this optometrist even, because he is actually taking out and removing a tooth and so on, then he is doing a piece of surgery to that extent.

Q. My point is with reference to the materials needed to accomplish the professional service. Isn't it the same?

A. You mean the things that have to enter in?

Q. Yes.

A. The bridges?

Q. Yes.

A. The appliances, the prosthetic appliances to enable—in order to enable him to function as near normally, with [fol. 876] reference to his mouth, as these glasses enable him to function with reference to his eyes, yes. These are prosthetic appliances (indicating).

Q. The fact that an optometrist in correcting one's defective vision has to furnish materials is no different from a doctor having to put splints on a broken leg, is it?

A. No, and there is no reason why a doctor can't. Nobody says he can't.

Q. Still you have the professional relationship and a fee for services, isn't that right?

A. And I think the various situations that arise control somewhat that state of affairs, but you notice this always, that the professional fee is charged as a professional fee, and the services for the professional fee are the hours, he rates his time at so much an hour, as the dentist does, and so forth; but then the laboratory has to do these other things over here according to the measurements that he had to take as a professional man, so it is the same thing in a modified form.

Q. His fees for the professional services, together with such materials as are necessary to give a desired result to the patient's ailment or defective [fol. 877] vision?

A. That is right, so an optometrist includes those all in there, yes, to be sure, that is true.

Mr. Daugherty: That is all. Thank you, Doctor.

Recross-examination.

By Mr. Harkey:

Q. Instead of furnishing glasses as part of his services he might, say in the case of a welder, tell him to start using his welding hood all the time?

A. That is right.

Q. And stop looking at the sparks?

A. Yes.

Q. Or in the case of a youngster he might have to give him visual training?

A. Visual training, that is right.

Q. Now, Doctor, have you ever known in your experience of eyes that were injured from disease or trauma in which a person doing a visual examination failed to discover that condition?

A. That is, you mean has it ever happened that somebody——

Q. In other words I am wondering this, Doctor——

Mr. Daugherty: Now you are getting into the field of ophthalmology.

[fol. 878] Mr. Harkey: That is right. Strike that.

The Witness: I could answer it for you.

By Mr. Harkey:

Q. Well put it this way, Doctor, don't you think that visual examinations should be given by persons well qualified and trained to discover diseases of the body as reflected in the eye, and diseases of the eye?

A. Of course that, if I may be so bold as to say, is the weakness of the whole system, because the ophthalmologists, who ought to remember that the eyes are part of the human body, have to be reminded constantly of the fact that they are part of the human body.

He treats the specific thing, and not sometimes the body systematically. Sometimes a man fails to appreciate this fact.

Mr. Phillips: You are speaking of the optometrist?

The Witness: Of the ophthalmologist. He gets so involved specifically that he forgets, and he ought to be the first to remember, they are part of the body. And you say, as I have on occasion, "well now here, these eyes are part of the body." What else do you find? If you have hyperthyroidism, why don't you look for certain things? [fol. 879] You are just looking for specific things, what the correction is."

Now then presumably, in so far as it is possible, he is supposed to follow through, with the optometrist who, from certain indications and certain history says and draws the conclusion that there is a possibility of either local or systemic disease. He may have some evidence of it, then it is his business to make reference on the basis of the Golden Rule, that he would do for that patient what he would want somebody to do for him.

By Mr. Harkey:

Q. Are optometrists in general pretty good about referring patients to ophthalmologists or general practitioners when they discover conditions of that sort?

A. I would say in so far as the trainings have been increased and the skills and ability, yes. That is the ideal and the thing that should be done, but there is a little reticence.

Q. In other words the ethics of their profession require that they do it?

A. That is right. But if I refer my cases up and constantly lose them, then I may be tempted to hang on to them a little bit longer.

[fol. 880] Q. In those cases does the ophthalmologist usually refer them back down where there is a satisfactory inter-professional relationship?

A. Don't take this—When these men operate amongst themselves in such a manner that there is honesty and fairness, we will get along much better.

Mr. Phillips: Thank you very much, Doctor. You have done a splendid job.

Mr. Harkey: Doctor, you have a right to read this and sign it, or to waive it.

Mr. Phillips: You have a right to read this deposition and sign it, or you can waive the reading of it.

The Witness: I think that I had better read it, and I will tell you why, in the general sort of conversation which we have been pursuing, it may need to have some little deletion here or a qualification there.

Mr. Phillips: Sir, you wouldn't be entitled to delete.

The Witness: No?

Mr. Phillips: But you would be entitled to correct.

The Witness: Correct.

[fol. 881] Mr. Phillips: Correct errors.

The Witness: Well if I made too broad a statement—I don't know if I did anywhere.

Mr. Phillips: I think you were very cautious, but if you made a mistake, if there had been a mistake in your testimony——

The Witness: As far as I know, I don't remember anything in which I made any mistake.

Mr. Phillips: Now ordinarily——

The Witness: I may have emphasized it a little bit, or underestimated.

Mr. Phillips: Now let's do this, let's use the same procedure we used with Dr. Braley.

Mr. Harkey: Sure.

Mr. Phillips: We will have the clerk mail a copy of the deposition to you, and you make your corrections on it, and send it then directly to the court.

Charles Sheard.

[fols. 882-884] Certificate of Notary Public to Deposition (omitted in printing).

[fol. 885] In United States District Court

Plaintiffs' Exhibit 2

Oklahoma Optometric Association

Affiliated with the American Optometric Association

Office of the Secretary-Treasurer, John D. Gresham, O. D., Gresham Bldg., 113 N. Harrison, Cushing, Oklahoma.

March 13, 1953

Fellow Optometrists:

We Are Off To War.

Last Sunday a Chain outfit opened a cut rate, credit, nothing down, $1.00 a week, one half page add in the Tulsa World. The firm is operating in the Zales Jewelry Co.

This in addition to the spreading menace of the dispensing opticians has forced us to introduce into the legislature this past week House Bill # 953, and companion Bill Senate Bill # 294. (These are both the same bill).

Sponsors of the bill were Representatives Harkey of Idabel, Ham of Pauls Valley, Sandlin of Holdenville, Vandiver of Heavener, Welch of Broken Bow, and the following Senators; Senator Collins of Sapulpa, Hope of Pauls Valley, Cooper of Atoka, Cowden of Chandler, Price of Tulsa, Field of Texhoma.

Will you without fail get a letter to your Senator and Representative? Telling them you understand these bills have been introduced, and urge them to strongly support them in behalf of Optometry, and the vision of the public.

These bills should stop the unscrupulous practice of untrained men, from doing the same things that our boys have spent three to five years training to do. There are some fifteen spread over the State advertising in all manner.

We are enclosing herewith a few suggestions hurriedly prepared. We suggest in your letter that you use any, or all of these, but write the letter in your own words, and change these suggestions to suit your own phraseology. Add other suggestions that you think will help to get support.

Keep this letter confidential in your own hands.

This is every man's fight, and it must be to the finish.

Two things we do not want. First we do not want to have our present law amended. Second, we do not want the dispensing opticians licensed to practice.

Yours for victory, Billy, W. S. Farmer, O.D.

Confidential.

WSF em.

[fol. 886] Confidential.

Reasons

Section 1.

Optometrists and Ophthalmologists through their efforts of dealing with such cases as glaucoma, cataracts for surgery, and many other eye diseases, have been able to keep blindness at a minimum in the State of Oklahoma. Persons unqualified in eye care are unsafe and dangerous in dealing with human vision without the supervision of one trained and qualified to do so.

Section 2.

Optometrists are required to have five years training in colleges and universities before graduation anywhere in the United States and foreign countries; then they must prove their proficiency before a state board of examiners before being permitted to practice.

The Attorney General in this and several other states

has issued opinions in support of the above contentions—in effect that the examiner or prescriber is responsible to his patient for the complete results.

Section 3.

Because of the many dangers of the unwary and confused public practically all display advertising in the health fields is considered misleading, highly commercial, unethical and unprofessional by the professions of optometry and ophthalmology, as well as by professions in other fields of health care. We think this law will clarify the duties of all interested groups and protect the public's vision. Advertising persuades people to buy glasses whether they need them or not, which could result in damage to eyesight.

Section 4.

In addition to preventing soliciting and the use of cappers or steerers in this important field of eye care, this bill will also prevent a licensed professional person from hiring himself or his license out to a person without a license to practice or as a front for these unscrupulous men, companies, or firms who operate on a purely commercial basis. Optometrists cannot do this under our present law, but our law exempts physicians, and there are others—nothing more than laymen—doing this work. This bill will also help retain the doctor-patient relationship without the interference or control of a third party who is untrained and unqualified, and therefore, dangerous to the patient's welfare.

Section 5.

In spite of present laws and the Attorney General's Opinion in this and other states, some commissions, boards and other agencies continue to prevent the patient or person from choosing the legally qualified practitioner of his choice.

We believe this is a good bill with equality and justice for all concerned and definitely in the interest of reduced blindness and thus better vision for the public.

There are already two laws against discrimination, but

they do not care, all public agencies in this section will merely permit further discrimination.

Confidential.

[fol. 887] IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 14

(Seal)

Selected Examination Questions and Written Tests
given by the
American Board of Opticianry
or by
Schools of Opticianry

and used by the Board in connection with Written Examinations for Students Graduated from Schools of Opticianry Approved by the Board and Who Apply for Certification as Associate in or Master in Ophthalmic Optics.

No examinations are given to those applicants who are certified by the Board as Honorary Masters in Ophthalmic Optics. (See Manual of the Board for requirements for Honorary certificate.)

[fol. 888] Examination in Theoretical Ophthalmic Optics

1. Define refraction, diffraction, wavelength, refractivity, prism diopter, back focal length, effective power, toric surface, aphakia, aniseikonia.

2. What is the angle of deviation in degrees of a prism in which the principal angle is 10 degrees and the index of refraction is 1.62? What is the value of this prism in prism diopters? (Trigonometric tables will be furnished whenever needed.)

3. Find the change in effectivity of a lens which has a focal length of 25 centimeters if it is moved 20 millimeters away from a given plane of reference (such as the cornea).

4. What is the focal length and dioptric power of an assumed THIN double convex lens ground with a radii of 50 and 100 centimeters, respectively, and from glass with an index of 1.69? Answer this same question if the radii are —50 and —100 centimeters, respectively (double concave lens).

5. A lens has a thickness of 6.08 millimeters and the glass has an index of 1.52. If the dioptric powers D_1 (more remote from eye) and D_2 are 18 and —6 diopters, respectively, what is the back focal (or vertex) power of this lens?

6. If you have a +5.00 D. S. with a +3.00 cyl ax 90, what are the positions of the two principal focal lines and what is the value of the interval of Sturm?

7. A toric lense having the formula

$$-4.00 \text{ D. S.}$$
$$+3.00 \text{ D cyl ax } 45 \bigcirc + 5.00 \text{ D cyl ax } 135$$

is made of glass having a refractive index of 1.523. Find the radii of curvature of the toric surface in the two principal meridians.

8. If you desire a 40 millimeter round lens with a shop thickness of 1.2 millimeters, and with dioptric powers of the surfaces of +10 diopters and —6 diopters, what is the minimum thickness of the blank that must be used?

9. What is a "slab-off" prism? When would you use one? Assume any data you please and work out your answer to show the use of "slab-off" prisms or a difference in size of segments.

10. A fused bifocal has the following data: +2.50 D. S. ⊂ +1.00 cyl ax 180. Add +2.50 D. S. If the glasses used in the bifocal have indexes of refraction of 1.52 and 1.65, respectively, what is the power of the contact surface of the segment with the main lens? (Note: You may make your calculations on the basis of a sphero-cylindrical lens, or a —6 base curve.)

11. Discuss spherical and chromatic aberrations of lenses. How may these errors be minimized?

12. Select any fundamental relationship (or formula) in ophthalmic optics, state the theorem and prove it by geometry, algebra or trig-nometry.

[fol. 889] Examination in Practical Optics and Special Optics

1. How much displacement do you get with a 2 diopter prism at one-half meter? At 3 meters?

2. How much decentration, and in what direction, is necessary to produce a 3 prism diopter base out, right eye,

in a prescription of +2.50 D. S. ⌒ +4.00 cyl ax 90? If you need a 1.5 prism diopter, base up, what is your answer?

3. Calculate the amount of imbalance and give the type of bifocal that will give the smallest amount of vertical imbalance in the following case:

R.E. +1.00 D.S. ⌒ +1.00 syl ax 90
L.E. +3.00 D.S. ⌒ +1.50 syl ax 90
Add both eyes +2.00 D.S. 38 × 42

Segment 16mm. high Reading point 8mm. below

4. Calculate the curves on the following single vision lenses, +6.00 base curve, semi-finished cylinders: (a) +2.00 ⌒ +2.00; (b) +3.00 ⌒ −2.00; (c) −1.00 ⌒ −2.00; (d) −2.25 ⌒ +2.25 cylinder.

5. Define hyperopia, myopia, astigmatism, glaucoma, cataract, accommodation, convergence, cornea, optic nerve, ophthalmometer, ophthalmoscope.

6. Write a paragraph of about 200 words concerning the optical constants of the eye, such as length, dioptric power, corneal power, constituent parts or elements, indexes of refraction of media, coats of the eye, and so forth.

Examination in Ophthalmic Optics

Part I

1. Define refraction, reflection, diffraction, relative index of refraction, refractivity, prism diopter, back focal length, effective power, principal focal lines, interval of Sturm.

2. What is an Angstrom unit? To how many millimicrons is 6000 Angstroms equivalent? If the velocity of light is 3×10^{8} meters a second, find the frequency for light having the wavelength given in this question.

3. What is the angle of deviation (D) of a prism whose principal angle (P) is 60 degrees and index of refraction (n) is 1.62?

4. What is the relationship between 1 degree principal angle, 1 prism diopter and 1 degree deviation if $n = 1.68$?

5. What is the resultant value of the prism and the angle of the resultant prism if a 5 prism diopters B.A. 90

degrees is combined with a 10 prism diopters B.A. 180 degrees?

6. Suppose parallel rays of light pass from air into a denser medium of index 1.50 having a convex (toward air) surface with a radius of curvature of 25 centimeters. Find the posterior and anterior focal lengths.

[fol. 890] 7. If the radius of curvature of the cornea is 8 mm. and the index is 1.337, what is the dioptral power of the cornea?

8. Find the change in effectivity of a lens which has a focal length of 25 cm., if it is moved 2 cm. away from a given plane of reference.

9. What is the effective focal length or back focal length of two thin lenses of 10 and 8 inches, respectively, separated by 3 inches?

10. What is the focal length and dioptral power of a lens, in which the thickness is negligible, ground with radii of 50 and 100 cm., respectively, and from glass with index 1.64?

11. If we desire a 40 mm. round lens with a strap thickness of 1.2 mm. and with dioptral powers of the surfaces of +10 D and —6 D, what is the minimum thickness of the blank that should be used?

12. A lens has a thickness of 6.08 mm. and the glass has an index of 1.52. If the dioptric powers, D_1 and D_2, are +18 and —8, respectively, what is the back focal power of this lens, using both exact and simplified formulas?

13. A workman, in finishing a plano-convex lens with index 1.669, uses an ordinary 4 diopter tool calculated on the basis of index 1.523. What is the power of the lens thus obtained, assuming thickness negligible?

14. Transpose the following lenses into two spherocylindrical forms:

(a) +1.75 D. cyl ax 90 —5.00 D. cyl ax 180
(b) —3.25 D. cyl ax 45 +1.50 D. cyl ax 135
(c) —0.75 D. cyl ax 180

15. If we have a +5.00 D.S. with a +3.00 cyl ax 90, what are the values of the positions of the two principal focal lines and what is the value of the interval of Sturm?

Part II

1. Discuss the conditions under which you would advise the use of contact lenses. Also outline (or state) the chief advantages (mechanical and optical) as well as disadvantages of contact lenses.

2. I desire a lens with a back focal power of +10.00 D.S. ⊂ +2.00 cyl ax 180. Its thickness if 6 mm. and its index is 1.50. Selecting any base curve you wish, calculate the dioptric powers in each of the two principal meridians in order to obtain the desired vertex or effective power.

3. In question No. 2, what is its spherical equivalent? Also, if the lens specified in No. 2 does not give satisfactory results when worn by the patient, what may be the trouble(s) and how remedied?

4. If a —6.00 D.S. ⊂ —4.00 cyl ax 90 is moved from a position 12 mm. in front of the eye to 16 mm., what is the effect on both spherical and cylindrical corrections?

5. What is the interval of Sturm? Calculate the positions of the principal meridians in the following case: +3.00 D.S. ⊂ +1.00 cyl ax 75.

[fol. 891] 6. If an eye (reduced) has a radius of curvature of 5 mm. and if the posterior focal distance (depth of eye) is 21 mm. and index of refraction is 4/3, what is anterior focal distance?

7. What is the size of the image on the retina of an emmetropic eye (use reduced eye data) if an object 10 mm. in height is viewed at a distance of 5 meters?

8. A prescription calling for +4.50 D.S. — —2.00 cyl ax 180 is decentered 4 mm. in and 3 mm. up. What are the horizontal and vertical prismatic effects? What is the resultant prism and at what angle?

9. Discuss the sizes and positions of segments that should be worn in various hyperopic and myopic conditions and with high and low reading additions.

10. A fused bifocal has the following data: +2.50 D.S. ⊂ +1.00 cyl ax 180. Add +2 D.S. If the glasses used in bifocal blank have indices of 1.52 and 1.65, what is the power of the contact surface of the segment?

11. What is hyperopia, myopia, astigmatism, anisometropia, antimetropia, strabismus, glaucoma, ophthal-

mometer, ophthalmoscope, rectus muscles, phoria, exophoria, indirect astigmatism, chromatic aberration, spherical aberration?

Part III

1. Contact Lens. If the ametropic correction at a distance of 13 mm. from the cornea is +8.00 D.S. and if the dioptral power of the cornea is 43.70, index of fluid lens, 1.337, and thickness of fluid lens is 0.8 mm., find the power of the outer surfaces of the fluid lens (or inner surface of contact plastic lens) to correct the error. If the thickness of the plastic lens (index 1.49) is 0.5 mm., find the power of the outer surface in order that the full correction for the ametropia shall be in the water lens.

2. Contact Lens. Assume a case in which the radius of the cornea is 7.5 mm. Assume dioptric error to be —10.00 D. and that the correcting lens is 14 mm. from the cornea. Also assume that the corneal portion of the eye mold shows an extent of 12 mm. and a height of 2.5 mm. Suppose we desire to give the overall clearance of limbus of 3 mm. and an apex clearance of 1 mm. Find the anterior and posterior powers of the contact lens.

3. You have the following lens prescriptions: O.D. +2.00 ⊂ +1.00 cyl ax 180 and O.S. +3.00 ⊂ +2.00 cyl ax 180. Addition O.U. +1.00 D.S. Ultex A (19 × 38) segment, reading level 8 mm. below the distance O.C.; segment 3 mm. below. Find the total vertical prism in each lens. How might the prismatic difference be corrected in this case? Would it be possible to use a different sized segment before each eye and correct the prismatic imbalance at the reading distance?

4. What are your conclusions as to prismatic compensation at the reading level of 10 mm. if the prescription reads: O.D. +2.00 D.S. ⊂ +1.00 cyl ax 180 and O.S. +3.00 D.S. ⊂ +2.00 cyl ax 90?

5. What are the horizontal and vertical prismatic effects produced when an eye looks through a +4.00 cyl ax 60 8 mm. below the horizontal position? Would you, in general, recommend decentration of cylinders with axes oblique angles?

[fol. 892] Special Topics

1. Define prism diopter, the symbol p. d., accommodation, convergence, myopia, hyperopia, astigmatism, crystalline lens, cornea and optic nerve.

2. What is the meter angle? What is the convergence in meter angles and accommodation in diopters if an emmetrope looks at a point 25 cm. from the eyes? If the interpupillary distance is 60 mm., how many prism diopters of convergence are used in fixing a point 33 1/3 cm. from the eyes? Throughout how many degrees do the eyes actually turn? (Assume fixation object in a line with the nose.)

3. Where is the far point of a hyperope of 2 diopters? Of a myope of 2 diopters? What simple test can be made to discover the presence of astigmatism?

4. Write a paragraph concerning the optical constants of the eye such as length, dioptral power, corneal power, etc., thickness of crystalline lens and its curvatures, indices of refraction, and so forth.

5. What is visual acuity? Visual efficiency? If a letter should subtend an angle of 5 minutes in order to be seen normally, calculate the size of the letter which should be seen at a distance of 50 feet, normally (i.e., emmetropia).

American Board of Opticianry
222 West Adams Street
Chicago 6, Illinois

[fol. 893] In United States District Court

Plaintiffs Exhibit 15

(Seal)

Outlines and Syllabuses
Second Edition
American Board of Opticianry
222 W. Adams Street, Chicago 6, Illinois

General Statements

Mathematical and Theoretical Ophthalmic Optics. Examinations, both oral and written, will cover the subject

matter as outlined in the attached syllabus and will be concerned with mathematical and theoretical optical principles.

The Practical or Laboratory Examinations and applications of these mathematical, physical and optical principles will be given in another set of examinations. The syllabus or outline of subject matter concerning Laboratory Examinations in opticianry also is enclosed.

The Special Topics and examinations therein are outlined briefly in the third syllabus.

Preparation for Examinations

In preparing for these examinations the following suggestions are made:

1) There will be no examinations in algebra, geometry and plane trigonometry as such. However, the candidate must be able to use mathematical principles and theorems in the proofs of optical problems.

2) If you have had collegiate courses in mathematics (covering essentially algebra, geometry and trigonometry) and in physics, it may be possible for you to prepare yourself for these examinations by thoroughly reviewing fundamentals and covering the topics given in the syllabus through a mastery of the specified materials as given in the appended list of recommended texts and published documents.

3) If you have had collegiate courses but with insufficient training in mathematics, physics and optics, it is suggested that you tutor with high school or college instructors in these subjects, or by attendance at night school.

[fol. 894] 4) If you have not had any college training or any part of the required two years of collegiate training as outlined by the Board and now given in the Rochester Junior College, Rochester, Minnesota, New York State Institute of Applied Arts and Sciences, Buffalo, New York, and the Los Angeles City College, Los Angeles, California, it may be possible for you to complete these courses over a period of years by attendance at day or night school courses or by private tutoring.

The Board is desirous of assisting any applicants who may be able to qualify for the examinations and for certification as either an associate or as a master in ophthalmic

optics by way of suggestions or possible sources of assistance in preparation for the examinations. Such requests should be addressed to the Executive Secretary of the American Board of Opticianry.

1. Mathematical and Theoretical Optics

I. Phenomena of Light and Physical Optics—Light - Wavelength - Velocity - Illumination - Polarization - Diffraction and Interference - Spectra - Radiant Energy - Modern Concepts of Radiation and Atomic Energy.

II. Reflection—Reflection of Light from Plano, Concave and Convex Mirrors - Law of Conjugate Foci.

III. Refraction—Index of Refraction - Relative Index - Mean Refractivity - Refraction by Media with Parallel Surfaces - Lateral Displacement - Vertical Displacement.

IV. Refraction by Curved Surfaces—Posterior Principal Focal Length - Anterior Principal Focal Length - Dioptric Formulae for Single Refracting Surface - Applications to Ocular Calculations.

V. Thin Lenses—Relative Powers - Dioptral Formulae for Thin Lens in Air - Addition of Thin Lenses in Contact - Conjugate Foci with Thin Lenses - Magnification - Newton's Formula for Conjugate Foci.

VI. Thick Lenses—Formulae for Single Thick Lens in Air - Back Focal Length - Equivalent Focal Length - Compound Refracting Systems - Optical Data on the Eye.

VII. Focal Powers of Modern Ophthalmic Lenses—Approximate Power - Equivalent Power - Effective or Vertex Power - Neutralizing Power - Simple Formulae - Relation Between Vertex Power and Neutralizing Power - Applications of Formulae.

VIII. Effectivity of Ophthalmic Lenses—Effect of Changing the Position of a Single Spherical or Cylindrical Lens in Front of the Eye - Effect of a Change of Position of a Lens in the Trial Frame - Amount of Axial Hyperopia or Myopia Corrected by a Given Lens.

[fol. 895] IX. Cylindrical Lenses—Principal Meridians - Power Meridians - Properties of Crossed Cylinders - Rules for Transposition - Toric Lenses - Rules for Transposing (Torics) - Refraction of a Sphere-cylindrical Lens - Calculations of the Interval of Sturm - Interval of Sturm in the

Human Eye - Ophthalmometry - Artificial Astigmatism - Spherical Equivalent - Vertex Power of a Sphero-cylindrical Lens - Oblique Refraction of a Cylinder - Obliquely Crossed Cylinders - Cylindrical Effects of Oblique Cylinders and Spheres.

X. Refraction by Prisms—Prism Diopter - Centrad - Prisms at Right Angles - Oblique Prisms - Resultant Prisms - Effective Prism Power.

XI. Decentration and Prismatic Effects of Lenses—Effects of Decentration - Formulae for Decentration - Resultant Decentrations - Effects of Oblique Decentration - Decentration of Cylindrical Lenses - Decentration of Sphero-cylindrical Lenses - Prismatic Effects of Decentered Spherical Lenses (a) Distant Objects, (b) Near Objects - Prismatic Effects in Anisometropic Corrections.

XII. Aberrations of Lenses—Chromatic Aberration: Dispersion and Dispersive Index - Ratio of Refractivity to Dispersion - Dispersive Power - Achromatic Prisms - Achromatic Lenses - Chromatism of Fused Bifocals - Aberrations Due to Forms of Lenses: Minimal Axial Spherical Aberration in a Single Lens - Coma - Radial or Oblique Astigmatism - Curvature of Image - Distortion - Tangent Condition.

XIII. Design of Spectacle Lenses—Astigmatic Image Surfaces and Form of Lens - Wollaston and Ostwald Types - Point-Focal Spectacle Lenses: Investigations of Tscherning - Trigonometric Computation of Rim Ray - Peripheral Magnification of a Spectacle Lens - Vista or Field of View - Summary of Properties of Best Forms of Spherical Ophthalmic Lenses - Best Form of Astigmatic Spectacle Lens.

XIV. Bifocal and Trifocal Lenses—Optical Requirements of Bifocals - Monocentricity and Duocentricity - Curvature of Contact Surface of Fused Bifocal - Sizes of Segments and Prismatic Elements Introduced - Isometropic and Anisometropic Corrections - Prismatic Compensation - Slaboff Prisms - Bicentric Grinding - Multifocal Lenses; Types and Uses.

XV. Absorptive and Protective Glasses—Physiological Significance of Radiations of Various Types - Classification of Absorptive Lenses - Industrial Lenses.

XVI. Special Ophthalmic Lenses and Corrective Appli-

ances—Iseikonic Lenses: Physiological Processes of Binocular Vision - Lenses for Changing Size and Shape of Dioptric Images - Magnification of Zero Power Lenses - [fol. 896] Contact Lenses: - Theory of Contact Lenses - Effective Power - Equivalent Power - Magnification - Calculations of Afocal Contact Lenses to Correct Specified Ametropias. Telescopic Spectacles: Advantages and Disadvantages - Telescopic Spectacles for Near Work - Magnification - Simple Type of Telescopic Spectacle - Feinbloom Telescopic Lenses.

Text Books Suggested in Theoretical Ophthalmic Optics

1. Boeder, Paul: Introduction to Mathematics of Ophthalmic Optics, American Optical Company, Southbridge, Massachusetts.

2. Cowan, Alfred: Refraction of the Eye. Lea and Febiger, 600 Washington Square, Philadelphia, Pennsylvania.

3. Emsley, H. H. and Swaine, Wm.: Ophthalmic Lenses. Hatton Press, Ltd., 72-78 Fleet Street, London E.C. 4, England.

4. Henker, O.: Introduction to the Theory of Spectacles. Published by Jena School of Optics, 1924. A few copies are still available in this country.

5. Knox, G. W. and Ellerbrock, V. J.: Light, Vision and Lenses. Ohio State University, Columbus, Ohio. Univis Lens Company, Dayton, Ohio.

6. Morgan, M. and Peters, H. B.: Optics of Ophthalmic Lenses. Associated Students Store, University of California, Berkeley, California.

7. Obrig, T. E.: Modern Ophthalmic Lenses and Optical Glass. Published by Obrig Laboratories, 49 E. 51st Street, New York 22, N. Y. (1935).

8. Sheard, Charles: Ophthalmic Optics. Essay contributed to Medical Physics. Year Book Company, 304 S. Dearborn St., Chicago, Illinois.

9. Waters, E. H.: Ophthalmic Optics. (2 vols.) Published by the author. Eastern Optical Company, 1238 Florida Avenue, Corpus Christi, Texas. (This set of books contains much of mathematics, theory and practice.)

2. Practical and Laboratory Optics

I. History of Glass.

II. History of Lenses.

III. Curve Calculations—A. Spheres - B. Cylinders - C. Multifocals.

IV. Single Vision Spherical Surfacing.

V. Single Vision Cylindrical Surfacing.

VI. Round Field Lenticular Surfacing—A. Center Thickness - B. Edge Curves.

VII. Oval Field Lenticular Surfacing—A. Center Thickness - B. Cylinder Curves on Edge.

VIII. Multifocal Spherical Surfacing—A. Segment Size Control - B. Low and High Adds.

IX. Multifocal Cylindrical Surfacing—A. Thickness Calculation - B. Depth of Countersink.

X. Laying Out of All Types of Surface Work—A. Single Vision Spheres - B. Single Vision Compounds - C. Single Vision Prisms - D. Spherical Multifocals - E. Cylindrical Multifocals - F. Prism Multifocals.

[fol. 897] XI. Use of Lensometer or Vertometer.

XII. Cutting—A. Optical Center (Decenter to correct P.D.) - B. Axis of Cylinder - C. Axis of Prism - D. Height of Segment - E. Displacement of Segment - F. Size of Lens - G. Shape of Lens.

XIII. Machine Edging—A. Selection of Pattern - B. Size Setting - C. Tension Adjustment.

XIV. Hand Edging—A. Rimless Bevel - B. Insert Bevel - C. Rimless Hand Edging.

XV. Drilling and Mounting—A. Regular No-spring Strap - B. Regular Spring Strap - C. Thin Lenses - D. Thick Lenses - E. Precision Strap - F. Shursets and Rimways - G. Numonts.

XVI. Shell Work—A. Bridge Size Control - B. Shaping of Eye.

XVII. Lining Up of Shell and Metal Frames—A. Front Adjustment - B. Pad Adjustment - C. Temple Adjustment.

XVIII. Inspection—A. Power of Lenses (1) Optical Centers (2) Axis of Lenses (3) Lens size (4) Pupillary distance (distance P.D., reading P.D.) - B. Temples (1) Style of temples (2) Length of temples - C. Bridge (1) Style of bridge (2) Size of bridge (3) Pad adjustment.

XIX. Prescription Analysis—A. Vertical Imbalances - B. Horizontal Centers: (1) Distance (2) Reading - C. Styles of Multifocal Lens - D. Image Sizes - E. Sizes of Lenses and Reading Segments in Relation to Prescription Power - F. Position of Axis Controlling the Possibility of Rimless or Insert Lenses.

XX. Mechanics of Dispensing—A. Correct Method of Taking P.D. - B. Selection of Correct Style of Frame or Mounting: (1) Cosmetically correct, (2) Optically correct, (3) Occupationally correct - C. Size of Bridge - D. Size and Shape of Lens - E. Length of Temple - F. Preparation and Adjustment of Finished Eyewear.

XXI. Relationship of Dispenser to Patient and Prescribing Doctor:

I. Patient: A. Mental Attitudes and Economic Considerations - B. Correct Approaches - C. Final Adjustment of Eyewear to the face - D. Satisfying the Patient About Eyewear Selected - E. Advice to the Patient on the Use of his Glasses - F. Provision for Subsequent Repairs, Adjustments and Replacements - G. Assessment and Collection of Fees.

II. Doctor: A. Professional Etiquette - B. Condations under which Patient should be Referred Back to Doctor - C. Problems of Satisfying the Patient and the Doctor.

Text Books suggested in Practical and Laboratory Optics

1. Job Coach for Prescription Shop. Bausch & Lomb Optical Company, Rochester, N. Y.

2. Optical Shop and Counter. Johnson, Weeks and Weller, Professional Press, 5 N. Wabash Avenue, Chicago 2, Illinois.

3. Ophthalmic Lenses: Their History, Theory and Application. Bausch & Lomb Optical Company, 635 St. Paul St., Rochester, N. Y.

[fol. 898] 4. Human Eye in Anatomical Transparencies. Kronfeld and Polyak. Bausch & Lomb Optical Company, 635 St. Paul St., Rochester, N. Y.

5. Training Manual for the Prescription Laboratory. American Optical Company, Southbridge, Massachusetts.

6. Ophthalmic Lenses and the Prescription Shop. Har-

old J. Stead. Sharon Optical Company, Geneva, New York.

7. Essentials of Modern Lens Theory and Practice. T. H. Calkins. Continental Optical Company, 1402 N. Capitol Avenue, Indianapolis, Ind.

8. Spectacle Fitting and Optical Dispensing. L. S. Sasieni. Hammond, Hammond and Company, London, England (1950).

3. Special Topics in Opticianry

The applicant for examination will be questioned on his general background of knowledge and information which is relevant to his work as an optician and his contacts with professional men in the field of visual care and the public which he is serving.

Special Topics will include:

I. Essentials of anatomy of the eye and physiology of vision such as are found in textbooks of physiology.

II. Definitions of terms commonly used in refractive conditions, either monocular or binocular in character.

III. Optical instruments used in ophthalmic or optical work; knowledge of general principles and uses such, for example, as ophthalmoscope, retinoscope, lensometer or vertometer.

IV. Special types or kinds of ophthalmic prescriptions and various ways and means of providing satisfactory visual service.

Text Books suggested in Special Topics

1. Those cited under Ophthalmic Optics, mathematical and optical theory.

2. Textbook of Physiology.

3. Atkinson, T. G.: Oculo Refractive Cyclopedia and Dictionary. The Professional Press, 5 N. Wabash Avenue, Chicago 2, Illinois.

4. Borish, I. M.: Clinical Refraction. The Professional Press, 5 N. Wabash Avenue, Chicago 2, Illinois. (Introductory chapters on the refractive status and closing chapters on single vision lenses, absorptive lenses and so forth are excellent.)

5. Kronfeld and Polyak: Human Eye in Anatomical

Transparencies. Bausch and Lomb Optical Company, 6
St. Paul Street, Rochester, N. Y.

6. Lewis, J. J.: Ophthalmic Dictionary and Encyc
pedia. Published by author, 7 West Madison Street, C
cago, Illinois.

IN UNITED STATES DISTRICT COURT 477

PLAINTIFFS' EXHIBIT 18



COYE W. McCLURE, M. D.
1005 MEDICAL ARTS BUILDING
OKLAHOMA CITY 2, OKLAHOMA

PATIENT Vivas Warren Jowe

DATE 1/10 1952

		SPHERE	CYLINDER	AXIS	PRISM	BASE	INSERT	MAIL TO PATIENT
DISTANT	R	———	-0.25	05			RIMLESS	☐
	L	+0.25	-0.50	10			HOLES PER PAIR 2 3 4	SIZE & SHAPE
ADD FOR NEAR	R		SEG. SIZE		SEG. HT.		TINT	46 Lucency Lady
	L							
TOTAL	R							
	L							

UNIVIS D B R	PANOPTIK	FULVUE	ULTEX A. B. AL	ORTH D	KRYPTOK	TRIFOCAL

PUPILLARY WIDTH		FRAME OR MOUNTING
DISTANT	NEAR	Will choose Toffo Arthur
67		

LENSES DECENTERED		D.B.L.	TEMPLE		PATIENT'S MOUNTING ENCLOSED
			BACK OF EAR	TOTAL	
R ½	L ½	22	44		

REMARKS

Wm E Coye M.D.

899

478 IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 19

American Optical COMPANY

PRESCRIPTION SERVICE

JOB NO. N.B.J. | INSPECTED | RECEIVED

PATIENT L. J. Martin DATE

138 N. Edwards

Wichita, Kans

Bifocal Patient? YES NO

Lens Instructions

		SPH.	CYL.	AXIS	PRISM	BASE	Dec. IN
Dist.	R	-.50	-.25	165			
	L	-.50					
Add. For Read.	R	+2.00	Seg. Hgt. 3 mm.	Seg. Width 20 mm.	Seg. Inset R 1½ mm. L 1½ mm.	Total Inset & Dec. R MM. L MM.	
	L	+2.00					
Total Read.	R						
	L						

Tillyer | Contex | Toric | Flat | Bevel | Rimless

Drilling Instructions

Holes Per Pair: 2 3 4

MARK A CIRCLE AROUND STYLE WANTED — Other Colors

Panoptik | Ful-Vue Bifocals | Tillyer Bifocals A B D AA | Kryptok | Ultex | Cruxite A AX B C | Calobar B C D

Write size of eye here: 46 x 42

Give lens shape pattern number here: TV-406

Special lens details

Winslow mount

Cat. No.				No-Scru	14K	10K	GF	WHITE	PINK	YELLOW
BRIDGE MEASMTS	HEIGHT Above	Even	Below	POSITION OF CREST Forward	Even	Back	ANGLE OF CREST	WIDTH AT BASE		CUST. FRAME or MTG. ENC.

BRIDGE SIZE 24 PUPILLARY WIDTH 72 Distance Between Lenses 44 Spread of Pads { At Top / At Bottom

Width Between Temple 1 Inch Back of Joint | Length to Top of Ear 67 | Total Length 6½ | Angle of Joint

Other Frame or M't'g Details

Dark ⊙ LEAVE BLANK

71/C

Signature:

℞ NO.

50212V

TILLYER LENSES—VISION CLEAR TO THE EDGE

900-900a

IN UNITED STATES DISTRICT COURT 479

PLAINTIFFS' EXHIBIT 20

W. G. GILLETT, M.D.
D. O. HOWARD, M.D.
T. WALKER WEAVER, M.D.
JACK D. WEAVER, M.D.
EYE PHYSICIANS AND SURGEONS

OFFICE PHONE 2-1276 WICHITA 2, KANSAS 201½ NORTH MAIN

NAME Lloyd J. Martin AGE

ADDRESS City DATE Sept 13, 1951

R Ey Vo

VRE -50 = -25 Cy 165
VLE. -50
Add + 2.00
Full Vue Bifocal or
Panoptic

REG. NO. M.D.

REPT. ☐ NON-REPT. ☐
1, 2, 3, 4 TIMES P.R.N. ☐

TAKE TO RUBY'S PRESCRIPTION PHARMACY
201 NORTH MAIN
FOR FREE PICK-UP AND DELIVERY SERVICE BETWEEN
9 A.M. AND 6 P.M.
PHONE 22-491

Clerk's Comments to [illegible]
Paper omitted in printing

900b=900c

480

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 21

TULLOS O. COSTON, M. D.
ROBERT I. TRENT, M. D.
708 MEDICAL ARTS BUILDING
OKLAHOMA CITY

Date 8/18/51

FOR Mr. Duke Duvall

DISTANCE

R. E.: Sph. ..... Cyl. ..... Axis ..... Prism ..... Base .....

L. E.: Sph. ..... Cyl. ..... Axis ..... Prism ..... Base .....

READING

R. E.: Sph. +1.50 Cyl. +0.25 Axis 45 Prism ..... Base .....

L. E.: Sph. +1.50 Cyl. ..... Axis ..... Prism ..... Base .....

REMARKS:

Phone 7-8551

Tullos O. Coston M. D.

901

[fols. 902-903] Plaintiffs' Exhibit 22 omitted. Printed side page 16 ante.

[fols. 904-955] Plaintiffs' Exhibit 23 omitted. Printed side page 18 ante.

[fols. 956-957] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 958] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1954

No. 184

MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al., Appellants,

vs.

LEE OPTICAL OF OKLAHOMA, INC., a corporation; ELLIS CARP, dba Douglas Optical; and Oran Ripps, Appellees

STATEMENT BY APPELLANTS OF POINTS TO BE RELIED UPON—Filed July 3, 1954

Mac Q. Williamson, Attorney General of the State of Oklahoma, Granville Scanland, County Attorney of Oklahoma County, Oklahoma, Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al, appellants herein, state that they intend to rely in this Court upon the following points:

1. The District Court erred in declaring the following portions of House Bill 953 (59 Okl. St. Ann. §§ 941-947) to be unconstitutional and void:

> Those portions of Section 2 (59 Okl. St. Ann. § 942), which make it unlawful for any person not a licensed optometrist or ophthalmologist "to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or

any other optical appliances to the face of a person * * *" or "to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other [fol. 959] optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision * * *" except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist;

for the following reasons:

(a) Such provisions are an integral part of an act designed by the Legislature to protect, and to promote, public health and welfare;

(b) Such provisions are not arbitrary, capricious or unreasonable, but bear a reasonable and rational relation to the public health and welfare;

(c) Such provisions constitute a valid exercise of the police power of the State, and, as such, do not violate any of the provisions of the Constitution of the United States;

(d) Such holding of the District Court is contrary to the principles of law announced and applied by this Court in the case of Roschen v. Ward, Attorney General of the State of New York, 279 U.S. 337, 72 L.ed. 722.

2. The District Court erred in declaring the following portion of House Bill 953 (59 Okl. St. Ann. §§ 941-947) to be unconstitutional and void:

That portion of Section 3 (59 Okl. St. Ann. § 943), which makes it unlawful "to solicit the sale of * * * frames, mountings * * * or any other optical appliances";

for the following reasons:

(a) Such provision is an integral part of an act designed by the Legislature to protect, and to promote, public health and welfare;

[fol. 960] (b) Such provision is not arbitrary, capricious or unreasonable, but bears a reasonable and rational relation to the public health and welfare;

(e) Such provision constitutes a valid exercise of the police power of the State, and, as such, does not violate any of the provisions of the Constitution of the United States.

3. The District Court erred in declaring the following portion of House Bill 953 (59 Okl. St. Ann. §§ 941-947) to be unconstitutional and void:

> That portion of Section 4 (59 Okl. St. Ann. § 944), which provides that "No person, firm or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examination or visual care to occupy space in such retail store."

for the following reasons:

(a) Such provision is an integral part of an act designed by the Legislature to protect, and to promote, public health and welfare;

(b) Such provision is not arbitrary, capricious or unreasonable, but bears a reasonable and rational relation to the public health and welfare;

(c) Such provision is a necessary adjunct to the prohibition against corporate practice (the practice of ophthalmology or optometry by commercial interests) which is clearly within the police power of the State, in the interest of public health and welfare. [fol. 961] (d) Such provision is primarily directed toward the regulation of the professions of ophthalmology and optometry, which is clearly within the police power of the State, in the interest of public health and welfare.

(e) Such provision is necessary to discourage secret or subrosa arrangements between professional men and commercial interests through which commercial interests engage in the practice of a profession to the detriment of the public health and welfare.

(f) Such provision constitutes a valid exercise of the police power of the State, and, as such, does not

violate any of the provisions of the Constitution of the United States.

4. The District Court erred in permanently enjoining the appellants, Mac Q. Williamson, Attorney General of the State of Oklahoma, and the seventy-seven County Attorneys of the State of Oklahoma from enforcing or attempting to enforce against the appellees the provisions of House Bill 953 (59 Okl. St. Ann. §§ 941-947) declared and adjudged unconstitutional and void for the following reasons:

(a) None of the provisions declared and adjudged to be unconstitutional and void are unconstitutional and void.

(b) Manifest oppression is not present which would justify a Federal Court in enjoining administrative officers of the State in the fulfillment of their duty.

5. The District Court erred in permanently enjoining the defendant, Zale's Jewelry Company, a corporation, from cancelling or terminating its lease to the appellee, Oran Ripps, on the ground of violation of the provisions of House Bill 953 (59 Okl. St. Ann. §§ 941-947), declared and adjudged to be unconstitutional and void for the following reason:

[fol. 962] (a) None of the provisions declared and adjudged to be unconstitutional and void are unconstitutional and void.

6. The District Court erred in holding in abeyance the counterclaim of the appellants and failing to declare the remaining portions of House Bill 953 (59 Okl. St. Ann. §§ 941-947) to be constitutional and valid and enjoining the appellees from violating the provisions of the same for the following reasons:

(a) The appellants made proper request for this relief in their counterclaim.

(b) The evidence in the case clearly indicated violations of remaining portions of House Bill 953 by the appellees.

(c) Upon the pleadings, evidnce and law, the appellants were clearly entitled to this relief.

Respectfully submitted, Mac Q. Williamson, Attorney General of Oklahoma, Fred Hansen, First Assistant Attorney General, James C. Harkin, Assistant Attorney General, Attorneys for Appellants.

Certificate of Service (omitted in printing)

[fols. 963-964] [File endorsement omitted.]

[fol. 965] In the Supreme Court of the United States, October Term, 1954

No. 185

Lee Optical of Oklahoma, Inc., a corporation and Ellis Carp, dba Douglas Optical, Appellants,

vs.

Mac Q. Williamson, Attorney General of the State of Oklahoma; Granville Scanland, County Attorney of Oklahoma County, Oklahoma; Robert L. Wheeler, County Attorney of Tulsa County, Oklahoma, et al., Appellees

Statement by Appellants of Points To Be Relied Upon—Filed July 2, 1954

Lee Optical of Oklahoma, Inc., and Ellis Carp, appellants herein, state that they intend to rely in this Court upon the following points:

1. The district court erred in failing to find and declare that the portion of Section 3 of House Bill No. 953 (59 Okla. St. Ann., Section 943) that makes it unlawful for any person "* * * to solicit the sale of spectacles, eye-

glasses, lenses * * * prisms * * * by radio, window display, television, telephone directory display advertisement, or by any other means of advertisement; * * *" violates Article I, Section 8, of the Constitution of the United States and the "equal protection" and "due process" [fol. 966] clauses of the XIV Amendment thereto in that:

(a) Such Section 3 places an unreasonable burden and restraint on interstate commerce by completely prohibiting all advertising of spectacles, eyeglasses, lenses and prisms.

(b) By prohibiting all advertising such section takes property rights of appellants without the due process of law guaranteed to them by the XIV Amendment to the Constitution of the United States.

(c) Such Section 3 denies appellants the equal protection of laws guaranteed to them by the XIV Amendment to the Constitution of the United States by completely prohibiting all advertising of spectacles, eyeglasses, lenses and prisms, all of which are standard commercial articles when other comparable standard commercial articles are not subject to any like advertising prohibition.

2. The district court erred in refusing to admit in evidence appellants' offered Exhibit 2.

Respectfully submitted, Duke Duvall, 1501 Liberty Bank Building, Oklahoma City (2), Oklahoma, [fols. 967-969] John M. Phillips, Dick H. Woods, Nine West Tenth Street, Kansas City (5), Missouri, Attorneys for Appellants.

Acknowledgment of Service (omitted in printing)

[fols. 970-971] (File endorsement omitted.)

[fol. 972] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

Nos. 184 & 185

[Title omitted]

Appeals from the United States District Court for the Western District of Oklahoma.

ORDER NOTING PROBABLE JURISDICTION—October 18, 1954

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted and the cases are consolidated for argument.